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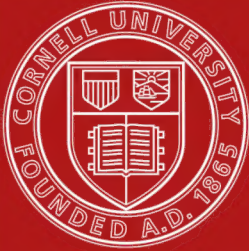
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**Selections from Leake's Elements of the**



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SELECTIONS

FROM

LEAKE'S ELEMENTS OF THE LAW OF CONTRACTS

AND

FINCH'S CASES ON CONTRACTS

ARRANGED AS A TEXT-BOOK FOR LAW STUDENTS

BY

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VOLUME I.

NEW YORK:

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SELECTIONS ON CONTRACTS.

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VOL. I.



## CHAPTER I.

### THE FORMATION OF CONTRACTS.

#### SECTION I.—SIMPLE CONTRACTS ARISING FROM AGREEMENT.\*

Agreement ..... 1 Promise ..... 2 Consideration ..... 3 Form of Simple Contracts by		Agreement ..... 4 Offer and Acceptance of Terms .. 5 Contracts upon Executed Consi- derations..... 13
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**The different kinds of contract.**—Contracts in the English law are generally divided into three kinds, distinguished by their different modes of formation,—namely, Simple Contracts, Contracts under Seal, and Contracts of Record. It is proposed to treat of them in the above order, commencing with Simple Contracts, because the rules and principles relating to the formation of contracts of that kind are of a less technical and more elementary character than those relating to the other kinds of contract.

Simple contracts may be divided into two classes, according to the sources or causes from which they arise,—namely, simple contracts arising from agreement, and simple contracts arising independently of agreement, the latter of which classes is commonly known as contracts implied in law (*a*).

**Agreement.** — Agreement consists in two persons being of the same mind concerning the matter agreed upon. The state of mind or intention of a person, being impalpable to the senses, can be ascertained only by means of outward expressions, as words and acts. Accordingly, the law judges of the state of mind or intention of a person by outward expressions only, and thus excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and actions; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to

(a) Compare the terms *ex contractu* and *quasi ex contractu* in the civil law; see 3 Austin's Jur 133, 223 Maine's Ancien' Law, 344, also Code Civil, l.

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3, t. 3, "Des contrats ou des obligations conventionnelles" and t. 4, "Des engagements qui se forment sans convention."

\* Ch. I, Sect. I, § 1, Leake.

agree in regard to some matter, that intention is established in law as a fact, whatever may be the real but unexpressed state of his mind on the matter (a). Agreement further imports that there should be a mutual communication between the parties of their intentions to agree. Consequently the law judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them; and an intention not so communicated though expressed by other means, as by communication to a third person, is immaterial to the question of agreement (b). In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are in general accepted as a more reliable guide to the intention than the latter; and the conduct may in some cases determine the intention even in opposition to the words,—according to the maxim, "*non quod dictum sed quod factum est inspicitur*" (c).

Agreement, as a juridical fact, has a varied and extensive effect in creating, modifying, and extinguishing rights throughout all branches of law; and in the law of contracts it is efficacious not only in creating simple contracts, but also in varying and rescinding them. Agreement is also an element in the formation of contracts under seal, though it appears therein only through certain prescribed formalities.

**Promise.**—In an agreement as the source of a legal contract, the matter agreed upon must import that the one party shall be bound to the other in some act or performance, which the latter shall have a legal right to enforce. The signification of an intention to do some act, or observe some particular course of conduct, made by the one party to the other, and accepted by him, for the purpose of creating a right to its accomplishment is called a *promise* (d). The parties to a promise are respectively called the *promiser* and *promisee*, which expressions also serve to designate the parties to a contract founded on an agreement containing a promise. When an action is brought upon such a contract the promisee and promiser appear respectively in the positions of the *plaintiff* and the *defendant* and are commonly referred to in those characters.

Promissory expressions reserving an option as to their performance do not constitute a promise, and are not sufficient to create a contract. Thus, where an employer engages a servant upon the terms of paying

(a) *Cornish v. Abington*, 4 H. & N. 549; 28 L. J. Ex. 262; *Alexander v. Worman*, 6 H. & N. 100, 112; 30 L. J. Ex. 198, 202; *Van Toll v. South-Eastern Ry. Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241; *Polhill v. Walter*, 3 B. & Ad. 114; *Pickard v. Seers*, 6 A. & E. 469; *Freeman v. Cooke*, 2 Ex. 654.

(b) See *Cox v. Troy*, 5 B. & Ald. 474; *Heinekey v. Earle*, 8 E. & B. 410;

*Browne v. Hare*, 3 H. & N. 484, 495; 27 L. J. Ex. 372, 376.

(c) Co. Lit. 36a; *Croft v. Lumley* 6 H. L. C. 672, 722; 27 L. J. Q. B. 321, 337; *In re Steer*, 3 H. & N. 504; 28 L. J. Ex. 22.

(d) 1 Austin's Jur. 279; Maine's Ancient Law, 323; Pothier, Obl. §§ 3, 4; Code Civil, § 1101.



the servant such remuneration as the employer shall please, the employer is not bound in law to pay anything (a). A person, in answer to a suitor for his daughter, wrote, "I shall allow her the interest on £2000, whether she remains single or marries; if the latter, I may bind myself to do it, and pay the principal at my death to her and her heirs." This was construed not to import an intention to give a binding promise, and consequently was held not to create a contract (b). Upon the principle that expressions not intended to be binding do not constitute a promise, it is held that commendatory expressions concerning the quality of goods made upon a negotiation for sale, without intending to warrant the quality, do not create a contract of warranty;—according to the maxim of the civil law, *simplex commendatio non obligat* (c).

**Consideration.**—It is further necessary in the English law that an agreement, in order to create a legal contract, should include in the matter agreed upon, besides a promise, what is called a *consideration* for the promise. The consideration may be described generally as some matter agreed upon as a return or equivalent for the promise made, showing that the promise is not made gratuitously. A gratuitous promise, or one agreed upon without any consideration for it, unless made with certain formalities to be noticed presently, is void of legal effect (d).

The object of requiring a consideration for a promise, as a condition of creating a legal contract by agreement, seems to be to secure a test that the parties have the intention of making a binding engagement, and are not using promissory expressions without any serious intention of engaging themselves to a contract. The fact of bargaining and giving an equivalent for the promise serves to show that the parties act with deliberation, and in the expectation that the transaction shall be binding.

**Gratuitous promises.**—Gratuitous promises, which are excluded by this rule from becoming contracts by mere agreement, are not altogether prohibited by English law. They may be made legally binding by using proper formalities, prescribed with the same view of securing deliberation and certainty, as will be seen in treating of contracts under seal, to which the doctrine of consideration does not

(a) *Taylor v. Brewer*, 1 M. & S. 290; *Roberts v. Smith*, 4 H. & N. 315; 28 L. J. Ex. 164; and see *Bryant v. Flight*, 5 M. & W. 114; *Parker v. Ibbetson*, 4 C. B. N. S. 346; 27 L. J. C. P. 236.

(b) *Randall v. Morgan*, 12 Ves. 67; and see similar examples in *Maunsell v. White*, 4 H. L. C. 1039; *Money v. Jordan*, 15 Beav. 372; 5 H. L. C. 185;

*Morehouse v. Colvin*, 15 Beav. 341.

(c) *Chandelor v. Lopus*, Cro. Jac. 2; 1 Smith's L. C. 5th edit. 160; and see *Ormrod v. Huth*, 14 M. & W. 651; as to fraudulent representations see *post*, Chap. VIII, Sect. II, "Fraud."

(d) *Plowden*, 308; *Pillans v. Mierop*, 3 Burr. 1670.

apply. In the case of *Pillans v. Mierop* (a) the question was raised whether mere writing was a sufficient solemnity to create a valid contract without a consideration, and was decided in the negative.

**Executed and executory consideration.**—The consideration of a promise may be *executed* or *executory*. An *executed* consideration is some act performed or some value given at the time of making the promise and in return for the promise then made. An *executory* consideration is a promise to do or give something in return for the promise then made. The contract with an executory consideration consists of a promise given for a promise, and comprises two promises.—the one promise forming the consideration for the other, and conversely. With respect to such contracts it is only necessary at present to observe, that either promise may be regarded for the time being as the consideration for the other (b).

An agreement satisfying the above-mentioned conditions, that is to say, containing a promise made by the one party for a valid consideration and agreed to by the other party, creates a contract by force of the mere agreement without other formality. The contract so created is a simple contract.

**Form of simple contracts by agreement.**—A simple contract is not required by law to be made in any particular form or with any particular solemnities, except in a few instances to be noticed presently where writing and signature are required; but it is left open to proof by any facts which are admissible and sufficient to establish the agreement according to the general rules of evidence and procedure. Hence the words and acts of the parties, which are the evidences of their agreement, constitute in general the only *form* in which the contract created by the agreement appears. Some distinctions and observations, however, of a general character have been made respecting the formation of agreements, which require here to be noticed.

**Express and implied contracts.**—Simple contracts created by agreement are sometimes distinguished, according to the manner in which the agreement is formed, as express and implied. The only difference between an express and implied agreement is in the mode of substantiating it. An express agreement is proved by express words, written or spoken, stating an actual agreement; an implied

(a) 3 Burr. 1670.

(b) Contracts of these two kinds are respectively distinguished in the civil law by the names *unilateral* and *bilateral* or *synallagmatic*. In the former only one of the contracting parties binds

himself to the other, as in a loan of money; in the latter each of the contracting parties binds himself to the other, as in the contract of sale. Pothier, Obl. par. 9; Code Civil, § 1102, 1103; 1 Austin's Jur. 297.

agreement is proved by circumstantial evidence showing that the parties intended to contract (*a*). Agreements may also be of a mixed character in respect of the mode of making them, that is to say, partly expressed in words and partly implied from acts and circumstances. No distinction, except in the nature of the proof, arises from agreements being express or implied.

It is necessary here to notice that the term implied in law is used to denote the class of simple contracts raised by law from facts and circumstances independent of agreement, and in which an agreement or promise, if implied at all, is an implication of law only, and has no existence in fact (*b*). In the above passages the term "implied" is used to describe an agreement which has an actual existence in fact, but which appears from circumstantial evidence and not in express terms.

**Contracts in writing.**—Simple contracts arising from agreement are frequently expressed in writing, and are in some instances required by law to be expressed in writing. They do not on that account constitute a distinct kind of contract, but are subject to the same rules of law as other simple contracts. The fact of their being written, however, renders them subject also to the rules of evidence relating to written documents; and the discussion of those rules in their bearing upon written contracts as a class, including therein other contracts besides simple contracts, is of sufficient importance to require treatment in a separate space.

**Offer and acceptance of terms.**—An agreement must necessarily be made in the form, or what is equivalent to the form, of an offer of the matter or terms of the agreement on the one side, and an assent to or acceptance of those terms on the other side, as in the following examples:—At a sale by auction each bidding is an offer of a price for the article put up for sale; and these biddings may be successively made until one is accepted by the fall of the hammer, when the agreement is complete (*c*). The sending an order for goods to a merchant or tradesman is in effect an offer to purchase; and the sending the goods is an acceptance of the offer, and creates a contract of sale (*d*). The publication of an advertisement offering a reward for information respecting a loss or a crime is an offer to any person who is able to give the information asked; and the acceptance of it by giving such information creates a valid contract (*e*). The time tables published

(*a*) See *Marzetti v. Williams*, 1 B. & Ad. 415, 423, 428; and see 1 Austin's Jur. 356, 377; Maine's Ancient Law, 344.

(*b*) See *ante*, p. 1.

(*c*) *Payne v. Cave*, 3 T. R. 148.

(*d*) See *Harvey v. Johnston*, 6 C. B. 295, 304; and see *Levy v. Green*, 8 E. & B. 575, cited *post*, p. 8.

(*e*) *Williams v. Carwardine*, 4 B. & Ad. 621.

by a railway company are a promise that the trains will run as advertised, offered to all persons who apply in a regular manner to be carried by them (a).

A correspondence between two parties by letter may contain an agreement which will produce a contract as binding as if drawn up in articles and signed by the parties as such; but there must be found in the correspondence a proposal of terms, met by such final acceptance as imports a consent of both parties. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument, the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion (b).

**Offer unaccepted.**—An offer unaccepted, or, what amounts to the same thing, of which the acceptance is not communicated to the party making it, does not constitute an agreement (c). The defendant sent to the plaintiff a letter offering to guarantee to the plaintiff the debt of a third party, and the plaintiff, though he gave credit to the third party on the faith of such guarantee, did not communicate his acceptance of it to the defendant; it was held that there was no contract, and that the plaintiff could not maintain an action upon the letter (d). A person wrote a letter to another offering to purchase of him a horse, and stating that if he received no answer he should assume that his offer was accepted, to which letter no answer was returned; it was held that the letter unanswered did not constitute an agreement, and that a person in making an offer has no right to put upon another the burden of notifying his refusal by letter or otherwise (e).

The contract arising from an agreement dates from the acceptance, and not from the offer of the terms. Accordingly, under a contract of sale passing the property in the goods sold, the title of the purchaser dates, not from his offer to purchase, but from the acceptance of the offer; and therefore he cannot sue for a conversion of the goods committed before the acceptance though after the offer (f).

**Variance between the terms offered and accepted.**—Where there is a variance between the terms offered and the terms accepted there is no agreement, or *consensus ad idem*, without which there can

(a) *Denton v. Great Northern Ry. Co.*, 5 E. & B. 860; 25 L. J. Q. B. 134.

(b) *Kennedy v. Lee*, 3 Mer. 441, 451; and see *Thomas v. Blackman*, 1 Coll. 301; *The Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, 491; 30 L. J. C. P. 380.

(c) *Russell v. Thornton*, 10 Ex. 323; 4 H. & N. 788; 30 L. J. Ex. 69.

(d) *M'Iver v. Richardson*, 1 M. & S. 557; *Mozley v. Tinkler*, 1 C. M. & R. 692.

(e) *Felthouse v. Bindley*, 11 C. B. N. S. 889; 31 L. J. C. P. 204.

(f) *Felthouse v. Bindley*, *supra*; and see *Stockdale v. Dunlop*, 6 M. & W. 224.



be no contract. As in the following cases:—The defendant offered to purchase the plaintiff's house, with possession on the 25th July, and the plaintiff accepted the offer with possession on the 1st August (a). The defendant offered by letter to buy a mare of the plaintiff upon his giving a warranty of her being quiet in harness, and the plaintiff wrote in answer agreeing to sell the mare and warranting her quiet in double harness (b). The defendant offered by letter to sell the plaintiff a certain quantity of "good" barley, the plaintiff by letter accepted the offer for "fine" barley, and it appeared that by the usage of the trade the expressions good and fine meant different qualities of barley (c). The defendant offered to purchase the lease of a house of the plaintiff on certain terms, and the plaintiff consented on the same terms to grant the plaintiff an under-lease (d). Upon a treaty for an underlease a memorandum of terms proposed by the lessee stipulated that it should contain all usual covenants and also the covenants in the leases of the ground-landlord, and the proposed lessee wrote on the memorandum that he agreed thereto, subject to there being nothing unusual in the lease of the ground-landlord (e). In all the above cases it was held that there was no binding agreement, because of the variance between the terms proposed and accepted.

The plaintiff applied by a letter in the prescribed form to the provisional committee of a railway company for an allotment of shares, undertaking to accept the shares and to pay when required the deposit thereon; the company informed the plaintiff by letter that they had allotted him the shares upon condition that the deposit was paid on a certain day, in default of which the allotment would be forfeited; it was held that the letter of allotment not being an unconditional acceptance of the offer made by the letter of application, the two did not constitute a valid contract (f). So, where to a similar letter of application an answer was sent by a letter allotting the shares, but the letter was headed "not transferable," it was held that this term qualified the acceptance of the defendant's offer, and that there was no contract (g). Where to a similar application an answer was returned that the shares had been allotted, and that the memorandum and articles of association must be signed, and in default thereof the shares and deposit would be forfeited, it was held that there was no complete contract to take the shares (h).

(a) *Routledge v. Grant*, 4 Bing. 660.

(b) *Jordan v. Norton*, 4 M. & W. 155.

(c) *Hutchison v. Bowker*, 5 M. & W. 535.

(d) *Holland v. Eyre*, 2 S. & S. 194.

(e) *Lucas v. James*, 7 Hare, 410.

(f) *Wontner v. Shairp*, 4 C. B. 404, 441; and see *Addinell's Case*, 1 L. R. Eq. 225; 35 L. J. C. 75.

(g) *Duke v. Andrews*, 2 Ex. 290; and see *Chaplin v. Clarke*, 4 Ex. 403.

(h) *Oriental Inland Steam Co. v. Briggs*, 31 L. J. C. 241; and see *Moore v. Garwood*, 4 Ex. 681. *In re Leeds Banking Co. (Howard's case)*, L. Rep. 1 Ch. Ap. 561; 36 L. J. C. 42; *In re Rolling Stock Co. of Ireland (Shackelford's case)*, L. Rep. 1 Ch. Ap. 567; 36 L. J. C. 818.

In contracts of sale conducted through a broker as the agent of both buyer and seller, if the bought and sold notes delivered by the broker to the respective parties vary in their terms, they will not serve to establish a contract (*a*), as where the two sale notes varied in the description of the goods (*b*), and where they varied as to the mode of payment, the one stating it to be by ready money and the other by bill (*c*). In a case where the bought and sold notes varied in several expressions, evidence was admitted of the mercantile meaning of the expressions in order to reconcile the two notes (*d*).

The defendant sent a written order for goods addressed to a person with whom he had been in the habit of dealing, and the plaintiff, who had succeeded that person in the business, executed the order without giving notice to the defendant that the goods were not supplied by the person to whom the order was addressed; it was held that there was no contract with the plaintiff, because the defendant had never intended to contract with him (*e*). An order was sent for certain goods, and goods were sent agreeing with the order, together with other goods not ordered, in one parcel and with one invoice; the court was equally divided upon the question whether, under the circumstances, there was a binding contract to pay for the goods ordered, or whether the purchaser might refuse the whole of the goods sent, and not merely those not ordered (*f*).

A variance between the offer and acceptance may be caused by the matter containing a term of ambiguous meaning, and the two parties accepting it with different meanings. There is then an apparent agreement; but each party in fact mistakes the meaning of the other, and it is open to each party to explain the meaning with which he accepted the term, in order to show that there was no real agreement between them (*g*).

**Preliminary negotiations.**—Terms offered and representations made during the negotiation for a contract, which are not comprehended in the matter of the final agreement, are excluded from the contract. The defendant represented to the plaintiff that a horse which he was about to sell by auction was sound, and the next day the plaintiff, relying on the representation, purchased the horse at the auction at which it was put up for sale, without a warranty; it was

(*a*) *Grant v. Fletcher*, 5 B. & C. 486; and see *Sievwright v. Archibald*, 17 Q. B. 103.

(*b*) *Thornton v. Kempster*, 5 Taunt. 788.

(*c*) *Gregson v. Ruck*, 4 Q. B. 737.

(*d*) *Bold v. Rayner*, 1 M. & W. 343; see *post*, Chap. I, Sect. IV, "Contracts and see *Kempson v. Boyle*, 34 L. J. Ex. 191.

(*e*) *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; and see *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; *Schmaling v. Thomlinson*, 6 Taunt. 147.

(*f*) *Levy v. Green*, 8 E. & B. 575; and see *Levy v. Green*, in the Exchequer Chamber, 28 L. J. Q. B. 819.

(*g*) See *post*, Chap. VIII, Sect. I, "Mistake."

held that the representation of the defendant formed no part of the contract. According to Maule, J., "the contract commenced when the horse was put up for sale, and ended when he was knocked down to the highest bidder," and thus excluded the representation, which was not made pending the contract (*a*). Upon the negotiation for a sale of goods a sample was exhibited, but a contract was afterwards made in writing describing the goods by kind and quality without referring to the sample; it was held to form no part of the contract that the goods should agree with the sample (*b*). Upon treaty for the sale of a ship it was represented as copper-fastened, but in the written contract of sale it was not so described; it was held that no warranty to that effect could be implied from the previous representation (*c*).

But fraudulent representations made with the intention of inducing the other party to enter into the agreement may become material, as giving ground for avoiding the contract or for an action of fraud; and such representations, though not absolutely fraudulent in law, may be material in equity, as affecting the right of the party making them to specific performance of the contract, or as founding a claim against him to make them good (*d*).

**Continuance of offer.**—The offer of a contract necessarily precedes the acceptance by some interval of time; and, as it must continue open until the acceptance, it is sometimes necessary to determine how long it continues open, and how it may be put an end to.

An offer may in express terms limit its own continuance, and it then comes to an end by mere lapse of time. Thus, an offer by letter is sometimes made conditionally upon receiving an answer by return of post (*e*). Offers not expressly limited are in general made upon the implied condition that they shall be accepted within a reasonable time (*f*), and if not accepted within a reasonable time may be treated as at an end (*g*). Application having been made for shares in a company in accordance with their published prospectus on the 8th of June, no allotment was made in answer to the application until the following 23rd of November; it was held that the allotment was not made within a reasonable time, and therefore that the applicant was not bound to accept the shares allotted, although he had not expressly withdrawn his application (*h*).

(*a*) *Hopkins v. Tanqueray*, 15 C. B. 130; 23 L. J. C. P. 162.

(*b*) *Tye v. Fynmore*, 3 Camp. 462; *Meyer v. Everth*, 4 Camp. 22.

(*c*) *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 627; *Freeman v. Baker*, 5 B. & Ad. 797.

(*d*) See *post*, Chap. I, Sect. VI, "Fraud."

(*e*) *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381.

(*f*) See per Lord Eldon, *Kennedy v. Lee*, 3 Mer. 441, 454; *Thornbury v. Bevil*, 1 Y. & C. Ch. 554; *Meynell v. Surtees*, 1 Jur. N. S. 737; 25 L. J. C. 257, 259.

(*g*) *Williams v. Williams*, 17 Beav. 213.

(*h*) *Ramsgate Victoria Hotel Co. v. Goldsmid*, 1 L. Rep. Ex. 109.

**Offer by letter.**—An offer by letter or other communication between distant parties continues open until the arrival of the letter or other communication in due course at its destination (a). If the delivery of the letter of offer is delayed by the default of the sender, the offer is extended until its arrival. The defendants by letter offered to sell certain goods to the plaintiffs, receiving an answer by return of post; the letter was delayed in consequence of the defendants having addressed it incorrectly, and the letter of the plaintiffs by return of post accepting the offer did not arrive until later than it would have done if the letter of offer had been correctly addressed; in the meanwhile the defendants not hearing from the plaintiffs had sold the goods to another person; it was held that there was a binding contract,—the Court saying that as the delay in notifying the acceptance arose entirely from the mistake of the defendants, it was to be taken as against them that the plaintiffs' answer was received in course of post (b). Where an offer was made by letter without requiring an answer by return of post, it was held that a notification of acceptance sent by post on the day of the receipt of the offer, though not by the next post, was sufficient (c).

**Acceptance by letter.**—Where the proposal sent by letter is accepted by letter, the contract is complete on the posting of the letter of acceptance. In the case of *Adams v. Lindsell* (d), the defendants having written to the plaintiffs a letter offering a sale of wool, after the letter of acceptance was posted and before its delivery, sold the wool to another person. In an action for not delivering the wool, it was contended on behalf of the defendants that there could be no binding contract until the answer was actually received, and before then the defendants had retracted their offer by selling the wool to other persons. But the Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. In the case of *Potter v. Sanders* (e) the vendor of an estate accepted an offer made by letter for the purchase of it by a letter posted on one day and delivered the next. On the latter day the

(a) See *Adams v. Lindsell*, cited *infra*.

(b) *Adams v. Lindsell*, 1 B. & Ald. 681.

(c) *Dunlop v. Higgins*, 1 H. L. C. 381.

(d) 1 B. & Ald. 681; and see per Wilde, C. J., *Harvey v. Johnston*, 6 C. B. 295, 304.

(e) 6 Hare, 1.

same estate was sold by an agent of the vendor to another party. Upon the question of priority between the two purchasers Vice Chancellor Wigram decided that it was unnecessary to inquire whether the letter of acceptance was delivered before the other contract was made. The delivery of the letter, he said, was merely the completion of an act by which the vendor had bound himself the day before; and the vendor, when he put into the post-office the letter to the plaintiff, did an act which, unless it were interrupted in its progress, concluded the contract between himself and the plaintiff.

The acceptance is complete and the contract valid upon the due posting of the letter of acceptance, notwithstanding delay, or even entire failure in arriving at its destination, provided such delay or failure has not been occasioned by a wrong address of the letter, or other default in the party sending it (a). In a case on appeal to the House of Lords against a decree of the Court of Session, it appeared that a letter was sent offering a sale of goods, which was accepted by a letter duly posted for that purpose; but the letter of acceptance not arriving in regular course of post by reason of delays in the post-office, not occasioned by any default in the sender, the owner of the goods refused to supply them; it was held that the contract was complete upon the posting of the letter of acceptance, and that the seller of the goods was liable for not delivering them according to the contract (b). The defendant by letter offered to buy goods of the plaintiff, and the plaintiff duly posted a letter accepting the offer, but the letter never reached its destination; it was held that the contract was nevertheless complete, and the defendant was bound to accept delivery of the goods according to the contract (c). In a case before the Court of Session in Scotland, a letter accepting a proposed contract was posted, and a subsequent letter recalling the acceptance was also posted and arrived at the same time with the previous one; the judges of the Court of Session, reversing the judgment of the court below, but not unanimously, held that there was no contract (d).

**Revocation of offer.**—The party making an offer of a contract is at liberty to revoke it by a notice to that effect given to the other party at any time before it is accepted (e). Thus, in sales by auction,

(a) *Dunlop v. Higgins*, 1 H. L. C. 381; *Duncan v. Topham*, 8 C. B. 225.

(b) *Dunlop v. Higgins*, *supra*.

(c) *Duncan v. Topham*, 8 C. B. 225.

(d) *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190.

(e) According to Pothier, an offer of a contract sent by letter may be withdrawn by the mere sending of a subsequent letter stating a change of mind, provided only it is sent before the first can have arrived, although it may not

arrive until after the first is received and answered; so that although on receipt of the first letter, and in ignorance of the change of mind conveyed by the second, an answer is sent accepting the offer, there is no contract, because there is no agreement. The passage from Pothier to this effect (*contrat de vente*, s. 32) has been cited by some writers as in accordance with English law (see Chitty, *Contr.* 7th edit. 12; *Head v. Diggon*, 3 M. & R. 97, 100, n. c), but it

either seller or bidder may withdraw their respective offers before the hammer falls (*a*). As an offer may be withdrawn, so it may be varied at any time until it has been actually accepted (*b*). Where negotiations ensued upon an offer with a view to an alteration of its terms, the party making the offer was held entitled to withdraw pending the negotiations before any terms had been finally acceded to (*c*).

An offer which in its terms allows a certain time for acceptance, may be withdrawn during that time before acceptance (*d*). In the case of *Cooke v. Oxley* (*e*) the plaintiff in his declaration stated that the defendant proposed to the plaintiff to sell and deliver certain goods upon certain terms, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day; the plaintiff then averred that he did agree to purchase the goods aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day, and proceeded to charge a breach by the defendant in not delivering; after verdict for the plaintiff, the declaration was held bad in arrest of judgment on the ground that it did not contain an allegation of a contract. It was said that the defendant was not bound to continue his offer until four o'clock because it was not made upon any consideration, and there was no averment that he in fact continued his offer at the time it was accepted, so that no agreement was alleged as a matter of fact. It may be remarked that the facts alleged, in the absence of proof of dissent by the defendant, might have been sufficient for a jury to infer the fact that the defendant's offer continued open when the plaintiff accepted it, so as to establish a complete agreement between them; but such fact could not be imported into the declaration without an allegation to that effect.

The defendant offered to purchase a house of the plaintiff and to give him six weeks for a definite answer; it was held that the defendant might retract his offer at any time during the six weeks before it was accepted (*f*). The defendant made a written offer to the plaintiff to sell him certain wool, with three days' grace from the date to make up his mind; within the three days the plaintiff went to the defendant to accept the offer, when the defendant said that he had offered the wool to another, and declined the sale; it was held that there was no contract, because, when the plaintiff signified his acceptance of the offer, the defendant did not then agree (*g*).

is here submitted that it is inconsistent with the decisions above cited, and contrary to principle in regarding as the test of agreement the abstract intentions of the parties instead of the expressions of intention communicated between them (see *ante*, pp. 1, 2).

(*a*) *Payne v. Cave*, 3 T. R. 148; *Warlow v. Harrison*, 1 E. & E. 295; 28 L. J. Q. B. 18.

(*b*) *Honeyman v. Marryat*, 21 Beav. 14.

(*c*) *Thornbury v. Beville*, 1 Y. & C. Ch. 554.

(*d*) *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. 653.

(*e*) 3 T. R. 653.

(*f*) *Routledge v. Grant*, 4 Bing. 653.

(*g*) *Head v. Diggon*, 3 M. & R. 97.

**Revocation by death.**—An offer is revoked by the death of the party proposing it. Accordingly, a person having authorized a supply of goods from a tradesman for the use of his family during his absence, and having died while absent, the tradesman was held to have no claim against his executor for goods supplied after his death (*a*). A person authorized the plaintiff to endeavor to sell a picture upon the terms that if he succeeded he should be paid £100, and died before the picture was sold; it was held that the employment was revoked, and that the plaintiff could not upon the sale of the picture recover the £100 against the representative of the employer (*b*). A person having ordered of the plaintiff a set of artificial teeth to be made and fitted died before they were made; it was held that the order was revoked by the death, and the plaintiff had no claim against the executor of the deceased for the work done by him in pursuance of the order (*c*).

An offer is also revoked by the death of the person to whom it was made before acceptance. In such case the offer cannot be accepted by the representatives of the deceased (*d*).

**Refusal of offer.**—A proposal is put an end to by a refusal of it. "If an offer made is rejected, the party making it is relieved from his liability on that offer, and the party who has rejected the offer cannot afterwards at his option convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the person who made the offer" (*e*).

**Offer not assignable.** The offer of a contract can be accepted only by the party to whom it is proposed, and cannot be assigned by him to another without the consent of the proposer. "In the simple case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A." (*f*). The defendant sent a written order for goods addressed to a certain person, and the plaintiff, who had succeeded to the business of that person, executed the order without giving notice to the defendant that the goods were not sent by the person to whom the order was addressed; it was held that there was no contract between them (*g*).

**Contracts arising upon executed considerations.** The process of agreement on which the contract is founded may be effected in the

(*a*) *Blades v. Free*, 9 B. & C. 167; and see *Smout v. Ilbery*, 10 M. & W. 1.

(*b*) *Campanari v. Woodburn*, 15 C. B. 400.

(*c*) *Lee v. Griffin*, 1 Best & Smith, 272; 30 L. J. Q. B. 252.

(*d*) See *Werner v. Humphreys*, 2 M. & G. 853.

(*e*) *Sheffield Canal Co. v. Sheffield & Rotherham Ry. Co.*, 3 Railway Cases, 121, 132; *Hyde v. Wrench*, 3 Beav. 334; *Honeyman v. Marryat*, 21 Beav. 14.

(*f*) See *Meynell v. Surtees*, 3 Sm. & Gif. 101, 117.

(*g*) *Boulton v. Jones*, 2 H. & N. 564.

following manner. The offer of a contract may be made in the form of a request to perform the consideration, which may be accepted by a performance of the consideration according to the request; or the offer may be made in the form of an offer of the consideration for acceptance, which may be agreed to by accepting the consideration offered. Contracts thus formed are described as arising upon executed considerations: in the one case the contract is formed by a consideration executed upon request, in the other case by the acceptance of an executed consideration.

A rule has been laid down by some writers as of universal application respecting contracts arising from executed considerations, namely, that an executed consideration will not support a promise unless the consideration was moved by a previous request. But it is also laid down by the same writers, that a previous request is implied by law, where a contract arises from the acceptance of an executed consideration. The implied request, here intended, is not an inference of fact like the implied agreements mentioned above (*a*); but it is an implication of law only, and in point of fact is a pure fiction. The use made of this fiction, and apparently the only use, is to preserve the universality of the above rule, that the executed consideration must be moved by a previous request (*b*). With the assistance of this fictitious request it is seen that all agreements arising from an executed consideration are reducible to the one form of a request to execute the consideration, followed by the execution of it according to the request; but if the fictitious request is discarded, they will be found in fact to appear in the two forms above given of a consideration executed upon a request, and an acceptance of an executed consideration.

### **Contracts arising upon consideration executed upon request.**

Where a request to perform the consideration is made in a manner or in terms importing a promise to pay for its performance, the promise may be accepted and rendered binding by the performance of the request, as where work is done, or services are rendered, or money is paid by one person at the request of another, with the intention that they shall be paid for. In such cases a valid contract arises to pay for them.

In the leading case of *Lampleigh v. Brathwait* (*c*) the facts, as stated in the declaration, were that the defendant having committed a felony requested the plaintiff to labor and do his endeavor to obtain his pardon from the King, whereupon the plaintiff did by all the means he

(*a*) See *ante*, p. 4.

(*b*) Chit. Contr. 5th ed., 57, 58; Smith's Contr., 3rd ed., 156, 160; notes to *Lampleigh v. Brathwait*, 1 Smith's

L. C., 5th ed., 135; *Fisher v. Pyne*, 1 M. & G. 265, n. (*b*)

(*c*) Hobart, 105; 1 Smith, L. C., 5th ed., 135.



could and by many days' labor do his endeavor to obtain the King's pardon; and afterwards, in consideration of the premises, the defendant promised the plaintiff to pay him. After verdict for the plaintiff it was moved, in arrest of judgment, that the consideration was passed before the promise was given, and therefore the promise was void as having been given without a consideration; but the Court held that a valid contract was created by the request of the plaintiff's services and the rendering of the services in pursuance of the request. The Court is further reported to have agreed "that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*, but if that courtesy were moved by a suit or request of the party that gives the *assumpsit* it will bind." Accordingly, wherever work is done or services rendered by one person at the request of another, provided such work or services are not asked for and performed as a gratuitous favor, a contract is formed to pay the value (a).

A contract of guarantee is usually made in the form of a request or offer, acceded to by performance. A person says to another, "If you will employ this man as your agent for a time, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you." The party indemnified is not therefore bound to employ the person designated by the guarantee, but if he do employ him then the guarantee attaches and becomes binding on the party who gave it (b). So, contracts of forbearance are commonly made in the form of a request of forbearance upon certain terms. The creditor is not bound to forbear, but if he does forbear as requested, he becomes entitled to exact the terms upon which the forbearance was asked (c).

A common example of this mode of contracting occurs upon the payment of money by one person at the request of another. If one requests another to pay money for him, in a manner importing an undertaking to repay it, the amount paid becomes a debt due to the party paying from him at whose request it is paid,—the request to pay and the payment according to the request forming a contract to pay the amount, which is technically described in law as a debt "for money paid by the plaintiff, for the defendant at his request" (d). Money paid by the plaintiff, against the payment of which the defendant has agreed to indemnify him, may in general be recovered by the plaintiff from the defendant as being money paid at his request, the indemnity being treated as equivalent to a request (e). Where the defendant requested the plaintiff to bring an action in a matter in which the defendant was

(a) See *Jewry v. Busk*, 5 Taunt. 302.

(b) Per Parke, B., *Kennaway v. Treleavan*, 5 M. & W. 498, 501; and see *Mills v. Blackall*, 11 Q. B. 353, 366; *Offord v. Davies*, 12 C. B. N. S. 748; 31 L. J. C. P. 319; *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J. Ex. 265.

(c) *Morton v. Burn*, 7 A. & E. 19.

(d) *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541.

(e) *Westropp v. Solomon*, 8 C. B. 345, 369; *Lewis v. Campbell*, *supra*.

interested, and the plaintiff incurred costs in so doing, he was held entitled to recover the amount as money paid at the request of the defendant (a). Where the plaintiff has been compelled to pay an accommodation bill accepted by him for the accommodation of the defendant, the payment may be considered as made at the request of the defendant, and may be recovered as money paid at his request (b).

**Contracts arising upon acceptance of executed consideration.** If a consideration is offered or performed in a manner importing the intention of being paid for it, the acceptance of the consideration imports a promise to pay for it on the terms of the offer, as where goods are offered for sale by the plaintiff and accepted by the defendant, or where money is offered on loan by the plaintiff and accepted by the defendant. A previous request on the part of the promiser to perform the consideration is here immaterial, the acceptance of it showing a sufficient agreement on his part to support a contract.

Hence, in pleading a contract of this kind, the allegation of a previous request, though formerly usual, is inartificial; such a request need neither be alleged nor proved. The following observations of Serjeant Manning on this subject, have been pronounced by Parke, B., to be perfectly correct (c):—"The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, *at his request*, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot from its nature have been a gratuitous kindness, but imports a consideration *per se*; it being immaterial to the right of action, whether the bargain, if actually concluded and executed, or the loan, if made, and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender."

**Contracts implied from assent to performance of consideration.**—A mere assent to or acquiescence in the performance of the consideration may be sufficient to import an agreement to pay for it. Thus, where the plaintiff, a surgeon, attended a pauper belonging to a parish of which the defendant was overseer, and therefore legally bound to supply the pauper with medical attendance, it was held that the knowledge of the overseers of the plaintiff's attendance, and their allow-

(a) *Bailey v. Haines*, 13 Q. B. 815, 882.

(b) *Garrard v. Cottrell*, 10 Q. B. 679; and see *Sleigh v. Sleigh*, 5 Ex. 514.

(c) Per Parke, B., *Victors v. Davies*, 12 M. & W. 758, 759, citing the note to *Fisher v. Pyne*, 1 M. & G. 266.

ing him to continue his attendance after such knowledge, was equivalent to a request to give such attendance and imported an agreement to pay for it (*a*). So, where the plaintiff, a surgeon, had attended a pauper belonging to the parish of which the defendant was overseer, and the latter requested the plaintiff to make out his bill to the parish and said that he should be paid, the defendant was held liable, Bayley, J., saying, "The conduct of the defendant as the overseer of the parish amounted to an acknowledgment on his part that the plaintiff had attended at the defendant's wish, and upon his responsibility" (*b*).

In the above cases the consideration performed by the plaintiff, the surgeon, discharged the defendant, the overseer, from a legal duty, so that he in fact received the benefit of the performance, a circumstance which would greatly strengthen the inference of a promise to be drawn from his knowledge and acquiescence. But in the case of necessities supplied to a child with the knowledge of the father, but without his order or authority, there being no legal duty in the father to maintain his child from which he is thereby relieved, it is held that no inference of a promise to pay for the necessities can be drawn only from his knowledge of the supply. The mere moral duty of the father to maintain his child affords no inference of a legal promise to pay his debts. In order to bind a father in point of law for a debt incurred by his child, it must be proved that he has contracted to be bound just in the same manner as such a contract would be proved against any other person (*c*).

**Where executed consideration will not create a contract.**—The consideration may be executed under such circumstances that there can be no presumption of an agreement to pay for it, in which case it will not create a contract.

The plaintiff having contracted with the defendant to command a ship for a certain voyage, abandoned the command during the voyage, but rendered services in assisting to navigate the ship, and claimed to be paid for the services thus rendered; it was held that he failed in proving any contract to pay for them, because they were done without the request or knowledge of the defendant, and because the defendant had not voluntarily accepted them. Pollock, C. B., said, "A recognition or acceptance of services may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The defendant did not know of the services until the return of the vessel, and it was then something past which would not imply, perhaps would

(*a*) *Lamb v. Bunce*, 4 M. & S. 275;  
*Paynter v. Williams*, 1 C. & M. 810;  
 and see *Tomlinson v. Bentall*, 5 B. & C. 738.

(*b*) *Wing v. Mill*, 1 B. & Ald. 104.

(*c*) *Mortimore v. Wright*, 6 M. & W. 482;  
*Hodges v. Hodges*, Peake, Ad. C. 79;  
*Seaborne v. Maddy*, 9 C. & P. 497;  
 and see *Law v. Wilkin*, 6 A. & E. 718.

not support a promise to pay for it. The benefit of the service could not be rejected without refusing the property itself. The ship came home, say partly by the assistance of the plaintiff: what could the defendant do but receive his ship back again? There was nothing in that to imply a contract to pay the plaintiff anything" (a).

The defendant having ordered goods of one person, the plaintiff, a different person, sent the goods, and the defendant having consumed the goods before he had notice that they belonged to the plaintiff, it was held that he was not liable to the plaintiff for the price, on the ground that not having had any option of returning the goods to the plaintiff, no agreement with him could be inferred from the acceptance of them (b).

In the case of buildings erected upon land under alleged contracts to pay for them, the inference as to the acceptance of the consideration drawn from keeping possession of the buildings, is different from the case of goods and chattels delivered and retained. The possession of the land by the owner necessarily involves possession of the buildings, without allowing him any option of rejecting them. Mere possession of land, therefore, does not raise any inference of the acceptance of buildings placed on it by another, in a sense implying a consent to pay for them (c).

Still less can an agreement be presumed from a consideration performed against the express consent of the other party, although he may derive some benefit from it (d). Accordingly, where a chattel is detained under a claim of lien against the owner, and charges are incurred in keeping and taking care of it during the detention, no claim can be made against the owner in respect of such charges (e).

**Contracts arising upon consideration obtained by wrong or fraud.**—Where the consideration has been obtained by the defendant from the plaintiff by wrongful or fraudulent means, the defendant cannot, in general, set up his intention to commit a wrong or a fraud in order to contradict the inference of a contract on his part to pay for the consideration. The defendant by fraud procured the plaintiff to sell goods to a third person, who was insolvent, for the purpose of getting them into his own possession; it was held that the plaintiff might recover the value of the goods as upon a sale to the defendant, who had obtained possession of them, and that the defendant could not be permitted to account for the possession by setting up the sale to the

(a) *Taylor v. Laird*, 1 H. & N. 266; 25 L. J. Ex. 329.

(b) *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117.

(c) *Munro v. Butt*, 8 E. & B. 738; *Ellis v. Hamlen*, 3 Taunt. 52; *Milner*

*v. Field*, 5 Ex. 829; *Farnsworth v. Garrard*, 1 Camp. 38.

(d) See *Stokes v. Lewis*, 1 T. R. 20.

(e) *British Empire Shipping Co. v. Somes*, E. B. & E. 353; 30 L. J. Q. B. 229.

third party, which he had himself procured by fraud (a). The defendant enticed away an apprentice from the plaintiff's service and appropriated the services of the apprentice to his own use; it was held that the plaintiff might waive the wrong and claim from the defendant the value of the services which the defendant had obtained from the plaintiff's apprentice, as having been performed at the request of the defendant (b). The plaintiff having taken an excursion ticket for a journey on the defendants' railway, which was subject to the express condition that no luggage was allowed, took certain luggage with him and had it carried on the journey; it was held, upon the principle above stated, that he was liable to pay the usual charge for the carriage of the luggage, as upon a contract arising from his obtaining the benefit of the carriage, and that the defendants had a lien upon the luggage for the amount (c).

**Where consideration obtained by a fraudulent contract.**—But where the consideration has been obtained by the defendant from the plaintiff by means of a fraudulent contract which the plaintiff is entitled to rescind on the ground of fraud (d), the plaintiff cannot assert any other contract than that in fact made. He must either sue upon that, or, disaffirming it, he must sue for the fraud as a substantive wrong, or for the recovery of his property obtained by means of it (e). The plaintiff sold goods to the defendant to be paid for by a bill of a third party "without recourse on the buyer in case of its not being paid;" the bill was worthless, as the defendant knew at the time of the sale; it was held that, though the plaintiff might avoid the sale and sue for the recovery of his goods, or might bring an action for the fraud, he could not recover in an action for goods sold to the defendant (f). The plaintiff having been induced by fraud to sell goods to the defendant upon credit, upon discovering the fraud sued the defendant for the price before the credit had expired; it was held that he had misconceived his remedy; the defendant was not liable according to the contract, and if the plaintiff disaffirmed the contract the goods remained his property (g). The plaintiff contracted to do certain work for the defendant at a certain price upon a fraudulent misrepresentation of the defendant as to the quantity, and having done the work, sued the defendant for its full value as work and labor done at the request of the defendant; it was held that there was no contract to that effect, but

(a) *Hill v. Perrott*, 3 Taunt. 274; see the observation on this case by Parke, B., *Selway v. Fogg*, 5 M. & W. 83, 84; and see *Biddle v. Levy*, 1 Starkie, 20; per Lord Abinger, C. B., *Russell v. Bell*, 10 M. & W. 340, 352.

(b) *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191.

(c) *Rumsey v. North-Eastern Ry. Co.*, 14 C. B. N. S. 641; 32 L. J. C. P. 244.

(d) See *post*, Chap. VIII, Sect. II, "Fraud."

(e) *Read v. Hutchinson*, 3 Camp. 352; *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312; *Selway v. Fogg*, 5 M. & W. 83.

(f) *Read v. Hutchinson*, 3 Camp. 352.

(g) *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312.

that he might either claim the contract price, or might repudiate the contract and sue the defendant in an action for the deceit (*a*).

**Contracts arising upon part performance of an executory consideration.**—Contracts founded upon executed considerations in the manner above mentioned frequently arise, where a contract with an executory consideration has been rescinded after part performance of the consideration. A new contract may arise upon the part performance of the consideration, in respect of its having been performed upon request, or being retained and accepted.

**Where default in completion is caused by the promiser.**—Under a contract with an executory consideration, if the promiser after part performance of the consideration refuses or prevents the completion, the promisee may insist upon his rights under the contract, but in general he has the option to treat the contract as rescinded, and prefer a claim upon a new contract arising in respect of the consideration executed, as accepted by the promiser or as executed at his request, as in the following examples :—The defendant ordered of a publisher a work to be delivered in twenty-four monthly parts, and after receiving eight he refused to receive more; the original contract could not be enforced because it was within the Statute of Frauds and not made in writing; but it was held that the defendant, by accepting and keeping the eight numbers, became liable on a new contract to pay the value of them (*b*). The defendant engaged the plaintiff to write a treatise for a periodical publication; the plaintiff commenced the treatise, but before he had completed it the defendant abandoned the publication; it was held that the plaintiff might treat the original contract as rescinded, and sue for the value of the work already done without completing the treatise (*c*). The defendant employed the plaintiff to find a purchaser for an estate upon the terms of receiving a percentage on the purchase money; the plaintiff having found a purchaser, the defendant refused to complete the sale; it was held that the plaintiff might recover the value of the work and labor which he had performed, as having been performed at the request of the defendant (*d*). The defendants, a public company, employed the plaintiff, a broker, to dispose of their shares on the terms that he should be paid £100 down, and £400 in addition upon the allotment of the whole of the shares of the company; the plaintiff disposed of part of the shares, when the company wound itself up and so prevented him from disposing of the remainder and earning the £400; it was held that the plaintiff was

(*a*) *Sehway v. Fogg*, 5 M. & W. 83.

(*b*) *Mavor v. Pyne*, 3 Bing. 285.

(*c*) *Planché v. Colburn*, 8 Bing. 14.

(*d*) *Prickett v. Badger*, 1 C. B. N. S.

296; 26 L. J. C. P. 33; and see *De Bernardy v. Harding*, 8 Ex. 822; 22 L. J. Ex. 340.

entitled to recover a part of the £400 proportionate to the work done, as having performed it at the request of the company (*a*). An agreement was made that the plaintiff should supply the defendant with board and lodging to be paid for by certain furniture of the defendant to be taken at a valuation; the defendant having suffered the furniture to be taken in execution, and so prevented the further completion of the contract, he was held liable for the value of the board and lodging which he had already received, as having been provided at his request (*b*). By a contract made between the plaintiff and the defendant, the plaintiff was to supply the defendant with a certain quantity of furniture on the terms of payment, one half in cash and the other half by bill at six months; after delivery of a portion under the contract, the defendant refused to take any more; it was held that the refusal of the defendant entitled the plaintiff to treat the contract for payment by bill as at an end, and at once to recover the value of the goods received by the defendant in an action for goods sold and delivered (*c*). An author employed a printer to print a work, who printed a portion of the copy delivered to him for that purpose, but discovering that another portion offered for printing was libellous refused to print it; it was held that he was entitled to recover the value of his work for the portion printed, as having been done at the request of the defendant (*d*). In this case the defendant did not in terms repudiate the contract, but prevented the completion of it except in an illegal manner, which was held to be equivalent to repudiation.

**Where default in completion is caused by the promisee.**—Similarly, upon a contract with an executory consideration, if the promisee after part performance of the consideration refuses to complete it, the promiser may in general treat the contract as rescinded: but in such case, by retaining the part-performed consideration, he may render himself liable upon a new contract arising from such executed consideration. Thus, in contracts of sale of a certain quantity of any article if part only is delivered and the seller fails to deliver the rest, the purchaser may return the part delivered: but if he elects to keep it after the seller has failed in performing his contract, he is taken to consent to pay the value (*e*). So, under a contract of sale of goods by description, if the goods delivered are not according to the description they may be returned; but if they are kept the seller may claim their value, because as explained by Parke, J., “from the circumstances a new

(*a*) *Inchbald v. Western Neilgherry Tea Company*, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(*b*) *Keys v. Harwood*, 2 C. B. 905; and see *Clarke v. Westrope*, 18 C. B. 765; 25 L. J. C. P. 287.

(*c*) *Bartholemew v. Markwick*, 15 C. B. N. S. 711; 33 L. J. C. P. 145.

(*d*) *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 287.

(*e*) See *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherell*, 9 B. & C. 386; *Champion v. Short*, 1 Camp. 53.

contract may be implied "(a). The defendant ordered two dozen of wine and the plaintiff sent four; the defendant kept a portion and sent back the rest, and was held liable only for the portion which he kept. As explained by Alderson, B., "The defendant had a right to send back all; he sends back part. What is this but a new contract as to the part he keeps?" (b). A written agreement was made for the performance of certain building work by the plaintiff for the defendant, but the agreement as to the mode and time of building was not complied with, and the defendant acquiesced in and accepted the building in a different form; it was held that there was a new agreement, under which the plaintiff was entitled to recover (c).

**Where part performance provided against in the original contract.**—The original contract may in its terms provide against and exclude any claim being made for a part performance of the consideration; and then, so long as the contract remains open and unrescinded, the part performance must be referred to the original contract, and no new contract can arise respecting it.

In the ordinary cases of one person employing another to do any work or services for him, the employment cannot be revoked before completion without reimbursing the person employed for the labor and expense he has already incurred under the employment. As for instance, in the case where an artist has been employed to paint a picture and the employer revokes the order before the completion of the picture, the artist would be entitled to compensation for the labor he has bestowed and the money he has spent. But this right must always depend upon the terms of the contract; and though a general employment may carry with it the right of revocation upon payment of what has been done under it, yet it is perfectly possible that there may be a contract of employment of a qualified nature to the effect that if the work is not completed there is not to be any payment. Thus, in the case of house-agents, ship-brokers, and businesses of that kind the employment may be revoked without any compensation (d). The plaintiffs, carrying on the business of clerical agents for the sale of livings upon the terms of a fee of three guineas for entering particulars in their books and making inquiries, and five per cent. upon the purchase-money on effecting a sale, were employed by the defendant to sell an advowson under an agreement to forego their usual fee of three guineas; the defendant having afterwards himself sold the advowson, the plaintiffs brought an action in which they claimed to be paid for the entry and inquiries as services rendered at the request of

(a) *Read v. Rann*, 10 B. & C. 438, 441.

(b) *Hart v. Mills*, 15 M. & W. 85.

(c) *Burn v. Miller*, 4 Taunt. 745; and see *Lucas v. Godwin*, 3 Bing. N. C. 737;

*Lamprell v. Billericay Union*, 3 Ex. 283; and see *ante*, p. 18.

(d) See per Jervis, C. J., *Simpson v. Lamb*, 25 L. J. C. P. 113, 116.



the defendant; but it was held that by the terms of their employment such services were not to be paid for, except in the event of their effecting a sale (*a*). An estate agent was employed to sell or mortgage a house on the terms of being paid a certain sum if successful; the mortgage was procured, but not through his efforts; it was held that he had no claim for the services rendered by him (*b*). The plaintiff, a ship-broker, was employed to procure a charter for a ship, upon the terms according to the usage of the trade that a commission was payable if the bargain was made, but if the bargain went off nothing was payable; the ship-broker procured a charter, but the bargain went off; he was held not to be entitled to any payment for his services (*c*). An architect agreed to prepare plans for building on certain land, on the terms that he was to make no charge for the plans unless the land was disposed of for the purpose of the building, when he was to be employed as the architect; the land having been otherwise disposed of it was held that he could not recover for his services (*d*). A contract was made between the captain of a ship and a sailor that the latter should be paid a fixed sum for his services during a voyage, provided he proceeded, continued, and did his duty as mate during the voyage; the sailor having died during the voyage, it was held that no wages could be claimed either under the contract or for the services performed (*e*). The plaintiff undertook to repair certain articles and make them complete for £10, and did certain repairs on them, but failed to make them complete; it was held that he was not entitled to claim any remuneration for the work done (*f*).

Upon this principle, where by charterparty the charterer covenants to pay freight for goods to be delivered at a certain place, and the ship is wrecked before arrival there, he cannot be charged with freight *pro rata itineris* upon a delivery and acceptance of the goods at the place of the wreck (*g*). But a new contract to pay freight *pro rata* may be inferred from an acceptance of the goods at an intermediate port instead of the destined port of delivery, if such acceptance was voluntary and the further carriage of the goods was intentionally dispensed with (*h*).

**Where contract rescinded by agreement after part performance.**—Where a contract after part performance is rescinded by express agreement of the parties, the liability in respect of the part per-

(*a*) *Simpson v. Lamb*, 17 C. B. 603; 25 L. J. C. P. 113.

(*b*) *Green v. Mules*, 30 L. J. C. P. 343.

(*c*) *Read v. Rann*, 10 B. & C. 438.

(*d*) *Moffatt v. Laurie*, 15 C. B. 583; 24 L. J. C. P. 56.

(*e*) *Cutter v. Powell*, 6 T. R. 320; S. C. 2 Smith's L. C. 1; *Appleby v. Dods*, 8 East, 300; *Jesse v. Roy*, 1 C. M. & R.

316; and see *Hulle v. Heightman*, 2 East, 145.

(*f*) *Sinclair v. Bowles*, 9 B. & C. 92.

(*g*) *Cook v. Jennings*, 7 T. R. 381;

*Hunter v. Prinsep*, 10 East, 378, 394.

(*h*) *Vlierboom v. Chapman*, 13 M. & W. 230, 238; and see *Ritchie v. Atkinson*, 10 East, 295, as to freight *pro rata* for an incomplete cargo.

formance must, in general, be referred to the agreement for rescission (a).

**Contract arising upon complete performance of executory consideration.**—Where an executory contract has been completely performed and there is left only a present money debt payable under it, the law implies in point of form a new contract to pay such debt as arising upon the executed consideration. The object of this implication seems to be to enable the plaintiff for the purposes of pleading and procedure to state his claim in the concise and general form of an *indebitatus* count, as “for money payable for goods sold and delivered;” or “for goods bargained and sold;” or “for work done and materials provided at the request of the plaintiff,” etc., as the case may be, reserving the particular circumstances of the debt, if disputed, to be given in evidence (b).

The contract thus implied has been explained as follows:—“The principle on which the cases have been decided, as to the proper mode of declaring where the original contract has been executory, but the period of credit has expired or condition has been performed, is not that the law alters the mode of declaring on the original contract and states it not according to the fact, but that it conclusively infers that simple contract to pay the price for goods sold and delivered, which would arise upon the facts of a sale and delivery without any special circumstances accompanying them. He who seeks to disturb that inference must not content himself with merely showing conditions or other special provisions forming part of the contract at the time of its being entered into; he must show them in existence and operation at the time of action brought; if not, they may be struck out of consideration and the contract treated as originally simple, unconditional, and executed” (c).

The following cases will serve as examples of the operation of this principle:—The plaintiff agreed to give a horse, warranted sound, in exchange for a horse of the defendant and a sum of money; the horses were exchanged, but the defendant refused to pay the money on the ground that the plaintiff's horse was unsound; it was held that the plaintiff might claim the money as payable for a horse sold and delivered (d). The plaintiff agreed to let the defendant a musical box, on the understanding that, if it was damaged, the defendant was to have it and pay a certain sum of money; the defendant received the box accordingly, and it was damaged while in his possession; it was

(a) See *Grimman v. Legge*, 8 B. & C. 324; *James v. Cotton*, 7 Bing. 266.

(b) 2 Wms. Saund. 349 b, (2); *Streeter v. Horlock*, 1 Bing. 34, 37; *Stone v. Rogers*, 2 M. & W. 443, 448; *Lucas v. Godwin*, 3 Bing. N. C. 737; See the

Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 59, Sched. B.

(c) *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829, 836.

(d) *Sheldon v. Cox*, 3 B. & C. 420.

held that the plaintiff was entitled to claim the agreed sum as payable for goods sold and delivered (a). The plaintiff contracted with the defendant "to build an engine of 100-horse power for the sum of £2,500, to be completed and fixed by the end of December," and after completing the contract sought to recover the price in an action for goods sold and delivered; it was held that he could not recover, because he had misdescribed the consideration of the debt. The Court, in giving judgment, said, "Whenever a simple contract is executed, and terminates in a debt which it is the duty of the defendant to pay *instantly*, it is no doubt the subject of an *indebitatus* count; but the executed contract must be described properly, and the question here is whether it is proper to describe this as a debt for goods sold and delivered. We think not. The proper form of count is in *indebitatus assumpsit* for work, labor and materials" (b).

A similar implication does not arise upon a contract created by deed or by record (c).

**The promise implied in contracts arising upon executed considerations. Quantum meruit.**—The promise implied from an executed consideration, whether implied from the request to perform the consideration, or from the acceptance of the consideration performed, in the absence of any express agreement respecting the price, is a promise to pay so much money as the executed consideration was worth, *quantum meruit* or *quantum valebat*, according to the explanation contained in the following passage from Blackstone's Commentaries (d):—"If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has his remedy for this injury by bringing his action on the case upon this implied *assumpsit*.—But this valuation of his trouble is submitted to the determination of a jury, who will assess such a sum in damages as they think he really merited. This is called *assumpsit* on a *quantum meruit*."

**Quantum valebat.**—"There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman without expressly agreeing for the price. There the law concludes that both parties did intentionally agree that the real value of the goods shall be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value."

(a) *Bianchi v. Nash*, 1 M. & W. 545.

(b) *Clark v. Bulmer*, 11 M. & W. 243.

(c) See 2 Wms. Saund. 349 b, (2);

*Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150.

(d) 3 Bl. Com. 162, 163; and see 2 Wms. Saund. 122, 122a.

## SECTION II.—CONTRACTS UNDER SEAL.\*

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**Contracts<sup>1</sup> under seal.**—Contracts under seal are formed by a deed sealed and delivered. They involve the element of agreement inasmuch as the parties by executing the deed agree to the matter of the contract; but they derive their legal effect solely from the formality of the deed which is used to witness the agreement, and not from the mere fact of agreement as in the case of simple contracts (*a*).

In general it is optional with the parties to put agreements into the form of a deed under seal. But agreements relating to some matters are required by statute to be made by deed. Thus, certain leases are required by the statute 8 & 9 Vict. c. 106, s. 3, to be made by deed. A gratuitous promise, that is, one made without a consideration, must be made by deed in order to give it validity (*b*).

**Deeds.**—“A deed is a writing or instrument written upon paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. . . . A deed cannot be written upon wood, leather, cloth or the like but only upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted” (*c*). The contents of a deed may be written or printed, in ink or in pencil (*d*). A deed is subject to all the rules of law relating to written documents.

**Signing.**—The execution of a deed consists of sealing and delivery. Signing a deed, though usual, is no part of the formality at common law (*e*). It is made necessary in some instances by particular statutes, and sometimes by the special terms of the authority or power in pursuance of which the deed is executed. The Statute of Frauds, which requires contracts relating to certain matters to be made in writing and signed, does not apply to contracts under seal; therefore contracts under seal, though relating to matters within that statute, do not require to be signed in addition to the ordinary formalities of the execution of the deed (*f*).

(a) See *ante*, p. 4.

(b) See *ante*, p. 3, and *post*, p. 33.

(c) Sheppard's Touchstone, p. 50; Co. Lit. 35 b.

(d) See *Schneider v. Norris*, 2 M. & S. 286; *Geary v. Physic*, 5 B. & C. 234, 237.

(e) Sheppard's Touchstone, by Preston, p. 56; *Tupper v. Foulkes*, 9 C. B. N. S. 797, 803.

(f) *Aveline v. Whisson*, 4 M. & G. 801; and see *Cooch v. Goodman*, 2 Q. B. 580, 597; *Cherry v. Hemming*, 4 Ex. 631, 636.

\* Ch. I, Sect. II, Leake.

**Sealing.**—The ceremony of sealing is sufficiently performed if a seal or other instrument be impressed on the deed with an intent to seal it, although no impression appear; and a deed purporting to have been sealed and delivered, in the absence of evidence to the contrary, will be presumed to have been properly sealed (*a*). An instrument purporting to be signed only and not sealed, and which in fact was signed only and not sealed, or intended to be sealed, as a deed, was held to be merely a simple agreement, notwithstanding a seal appeared opposite the signatures of the parties (*b*).

One seal will serve for several persons, if it sufficiently appears to have been intended and used as the seal of each (*c*); but a seal used and intended for the seal of one person only will not afterwards supply the want of sealing by another (*d*). Certain parties to a deed were described therein as members of a corporation, and the deed purported to be made and executed by the corporation and was sealed with a seal purporting to be the seal of the corporation; it was held that such seal could not be taken as the seal of those parties as individuals, so as to entitle them to be considered as parties to the deed in their individual character and to sue upon the deed in their individual capacity (*e*).

**Delivery.**—Delivery is necessary to complete the execution of a deed and to render it binding. Delivery may be effected by merely handing over the possession of the deed to the other party, or by authorizing the other party to take possession of the deed. It may also be effected by giving the possession of the deed to a stranger for the use and benefit of the other party, the intention being sufficiently expressed; a delivery to a stranger without any explanation of intention would be inoperative (*f*). Delivery may also be effected by mere words expressive of intention, although the party making the deed retains it in his own possession (*g*). A delivery may be evidenced by an acknowledgment by the party whose deed it is that it is valid and operative (*h*).

**Escrow.**—The delivery of a deed may be made upon a condition, so that the delivery is not complete and the deed is not binding until the condition is fulfilled. A deed so delivered upon a condition is called an escrow (*scriptum* or writing) (*i*). The condition on which the de-

(*a*) See *R. v. St. Paul's Covent Garden*, 7 Q. B. 232, 238, (*d*); *Talbot v. Hodson*, 7 Taunt. 251; *Clement v. Gunhouse*, 5 Esp. 83.

(*b*) *Clement v. Gunhouse*, 5 Esp. 83.

(*c*) *Ball v. Dunsterville*, 4 T. R. 313.

(*d*) *Cooch v. Goodman*, 2 Q. B. 580, 598.

(*e*) *Cooch v. Goodman*, 2 Q. B. 580.

(*f*) Co. Lit. 36 a; *Shepp. Touch*, 57,

58; *Doe d. Garnons v. Knight*, 5 B. & C. 671.

(*g*) *Doe d. Garnons v. Knight*, 5 B. & C. 671; and see *Xenos v. Wickham*, 14 C. B. N. S. 435; 31 L. J. C. P. 364; 33 *id.* 13.

(*h*) *Tupper v. Foulkes*, 9 C. B. N. S. 797; 30 L. J. C. P. 214; *Hudson v. Revett*, 5 Bing. 368.

(*i*) Co. Lit. 36 a; *Shepp. Touch*, p. 58; *Murray v. Earl Stair*, 2 B. & C. 82.

livery depends may be expressly stated at the time of executing the deed, or it may be inferred from the circumstances attending the execution (a). A delivery as an escrow may be effected though the party executing the deed retains it in his own possession, and it may be effected by delivery of the possession of the deed to a third party; but it is said that it cannot be effected by delivery of the possession to the party to whom the deed is made, because such a delivery is an absolute delivery if made without words, and if made with words purporting to control the absolute effect, the words are contrary to the act, and therefore of no effect, according to the maxim *non quod dictum est, sed quod factum est inspicitur* (b).

**Time of deed taking effect.**—A deed takes effect from the time of delivery. A deed is presumed to have been delivered and to take effect from its date; but it may be shown by extrinsic evidence that the deed was delivered and became operative on a different day from that on which it bears date (c). Thus a deed of charterparty was dated 6th February, and contained a covenant that the ship should sail on or before the 12th February, but the deed was not in fact executed until the 15th March; it was held that it might be averred and proved when the deed was in fact executed; and that the covenant for the ship to sail on a previous day, having then become impossible, formed no part of the contract (d).

Upon delivery of an escrow and performance of the condition the deed becomes effective from the date of the original delivery; so that if a bond is delivered as an escrow, and before the performance of the condition the obligor and obligee die, yet on the performance of the condition it becomes an effective bond and charges the assets of the deceased obligor; and so, if a woman before marriage delivers a bond upon condition and afterwards marries, whereby she loses her capacity to contract, and after marriage the condition is performed, the bond is valid and takes effect from the original delivery (e).

**Execution of deed in blank.**—A deed executed in blank, that is completely sealed and delivered with an omission of a material particular, is void, and cannot be made good by subsequently filling in the blank without a re-execution, or what is equivalent thereto (f)

(a) *Murray v. Earl Stair*, 2 B. & C. 82; *Bowker v. Burdekin*, 11 M. & W. 128; *Gudgen v. Besset*, 6 E. & B. 986; 26 L. J. Q. B. 36.

(b) Co. Lit. 36 a; Shepp. Touch. 59; but see *Johnson v. Baker*, 4 B. & Ald. 440; *Hudson v. Revett*, 5 Bing. 368, 387.

(c) *Goddard's case*, 2 Co. Rep. 4 b; *Taw v. Bury*, Dyer, 167 b; *Stone v.*

*Bale*, 3 Lev. 348; *Hall v. Cazenove*, 4 East, 477; *Jayne v. Hughes*, 10 Ex. 430; 24 L. J. Ex. 115; and see *Reffell v. Reffell*, L. Rep. 1 Prob. 139.

(d) *Hall v. Cazenove*, 4 East, 477.

(e) See *Graham v. Graham*, 1 Ves. jun. 272, 274, citing *Perryman's case*, 5 Co. Rep. 846, and *Froset v. Walshe*, Bridg. 51.

(f) Shepp. Touch. by Preston, 54.

Thus, a bail bond executed originally without a condition, and having the condition afterwards inserted, was held void (*a*). A deed was executed referring to a schedule annexed, but the schedule was omitted; it was held that the deed was void without the schedule, and that the annexation of the schedule subsequently to the execution did not render it effective (*b*). By a railway Act the sale of shares was required to be by writing under the hands and seals of the parties; it was held that a deed was necessary, which must be complete at the time of delivery, and consequently an instrument executed by the vendor with the name of the purchaser left in blank, which was afterwards filled up by a third party to whom it was delivered for that purpose was void (*c*). Where a deed contained a blank for a sum of money intended to be afterwards ascertained and inserted, which was afterwards done with the assent and in the presence of all parties, the deed was held valid on the ground that there was no complete execution until the blank was filled in (*d*). An agent who is authorized to fill up and execute a deed which is previously incomplete, so as to render it effective, must be appointed by deed in the same manner as an agent appointed to execute a deed in the first instance (*e*). In a recent case in which it appeared that a person had executed a deed in blank and by his alleged negligence had enabled another person to fill it up and use it in an unauthorized manner, the opinion was expressed by some of the judges that he might be estopped by his conduct from denying the validity of the deed, as against the parties claiming under it; but the majority of the judges seemed to be of a contrary opinion, on the ground that the doctrine of estoppel did not apply to the execution of a deed (*f*).

**Acceptance of contract under seal.**—The acceptance of a contract under seal is presumed, if nothing appear to the contrary (*g*). Hence a party may in general sue upon a contract under seal without having executed it (*h*). The presumption of acceptance is said to be founded on the principle that a man will accept that which is for his benefit; but it has been extended to the case of deeds containing onerous charges and liabilities on the part of the acceptor. In a recent case the Court in delivering judgment said:—"Almost every con-

(*a*) *Powell v. Duff*, 3 Camp. 181.

(*b*) *Weeks v. Maillardet*, 14 East, 568.

(*c*) *Hibblewhite v. M' Morine*, 6 M. & W. 200; and see *Taylor v. Great Indian Peninsular Ry. Co.*, 28 L. J. C. 285.

(*d*) *Hudson v. Revett*, 5 Bing. 368.

(*e*) *Hibblewhite v. M' Morine*, 6 M. & W. 200.

(*f*) *Exp. Swan*, 7 C. B. N. S. 400; *Swan v. North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; 31 L. J. Ex. 425; 32 *ib.* 273.

(*g*) See *Thompson v. Leach*, 2 Ventris, 198; *Petrie v. Bury*, 3 B. & C. 353, 355; *Doe d. Garmons v. Knight*, 5 B. & C. 671, 692.

(*h*) *Rose v. Poulton*, 2 B. & Ad. 822; *Morgan v. Pike*, 14 C. B. 473; and see *Wetherell v. Langston*, 1 Ex. 634, 643; *British Empire Ass. Co. v. Browne*, 12 C. B. 723; *Northampton Gas Light Co. v. Parnell*, 15 C. B. 630; and see *post*, p. 33.

veyance in truth entails some charge or obligation which might be onerous in the way of covenant or liability; and we think it much safer that one general rule should prevail, than that the Courts should be asked in each particular instance if the deed may not be considered onerous, and that doubts should be raised as to the particular moment at which the deed operates by the assent of the grantee" (a).

**Disclaimer.**—A party may disclaim the benefit of a contract under seal (b). Such disclaimer may be made by any sufficient words or acts, and does not require any particular form or manner of proof (c). It must in substance be clear and unequivocal (d). If a contract is made with two jointly and not severally, and one disclaims, the right to sue on it is not thereby vested in the other so as to entitle him to sue alone (e).

**Deed poll. Indenture.**—A deed poll is a deed made by one party only; an indenture is a deed made between two or more parties. An indenture is so called because it was formerly the practice to make a part or original copy of the deed for each of the parties on the same parchment, and then to separate them by an indented division, so that on subsequently comparing the parts they might be identified by the fitting of the indented edges (f). A deed poll was so called because the edge was polled or cut even. By 8 & 9 Vict. c. 106, s. 5, it is enacted that a deed executed after the 1st of October, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented.

The terms *indenture*, *deed* or *writing obligatory* import a deed under seal (g). A statute required that certain contracts should be made in writing under the hands and seals of both parties; it was held that it was intended and required that they should be made by deed (h).

**Covenant.**—A promise contained in a deed is called a *covenant*, also a *special* contract or contract by *specialty*; and the parties to a covenant are called respectively the *covenantor* and the *covenantee*.

**Bonds. Single bond and bond with condition.**—A bond is a deed wherein a party acknowledges himself to be bound to another in a certain sum of money to be paid to him. It is sometimes called an *obligation* in a special sense of that word. The parties to a bond are

(a) *Siggers v. Evans*, 5 E. & B. 367, 383.

(b) See *Butler and Baker's case*, 3 Co. 26 b; *Doe d. Garbons v. Knight*, 5 B. & C. 671, 694.

(c) See the authorities collected in Davidson's *Conveyancing*, 2nd ed. 5th vol. p. 1073, n. (a).

(d) See *Doe d. Smyth v. Smyth*, 6 B. & C. 112.

(e) *Wetherell v. Langston*, 1 Ex. 634; and see *Petrie v. Bury*, 3 B. & C. 355; *post*, Chap. VI, Sect. I.

(f) Shepp. Touch. 50; 2 Bl. Com. 295.

(g) See 1 Wms. Saund. 291 (1); *Aveline v. Whisson*, 4 M. & G. 801, 804; *Phillips v. Clift*, 4 H. & N. 168.

(h) *Hibblewhite v. M'Morine*, 6 M. & W. 200.



called respectively the *obligor* and the *obligee* (a). A bond containing merely such acknowledgment is called a *single bond*; but there may be appended to it a condition that upon the performance of a certain act the bond is to be void, otherwise to remain in full force, and it is then called a bond with a *condition* (b). The debt acknowledged by the bond is commonly fixed at a larger sum than the equivalent of the condition, and so operates to secure its performance, and is called the penal sum or penalty.

**Common money bond. Bond with special condition.**—*Common money bonds* are made subject to the condition to pay a sum of money with interest at a certain day, on payment of which at the day the bond is to be void, otherwise it is to be forfeited. In such bonds the penalty or sum acknowledged in the bond is generally fixed at double the amount in the condition. Any other matter may be made the subject of the condition, as the performance of the covenants in a deed, the faithful performance of an office by the obligor, or by a third party; such bonds are called bonds with *special conditions*.

**Relief against penalty of bond.**—By the common law the whole penalty became forfeited and was recoverable upon breach of the condition, according to the literal meaning of the bond. The Courts of Equity, however, gave relief against the forfeiture at law, upon payment of the amount really due under the condition, or of the damages arising from the breach of the condition. A power of granting similar relief in certain cases has been given to the Courts of Law by statute.

*Common money bonds* with a penalty, which by strict law were forfeited by non-payment of the money *ad diem* according to the condition, are now subject to the statute 4 & 5 Anne, c. 16, s. 12, by which it is provided that where an action is brought upon any bond with a condition to make void the same upon payment of a lesser sum at a day or place certain, if the obligor have before the action brought paid the principal and interest due by the condition, though such payment was not made according to the condition, yet it may be pleaded in bar of such action and shall be as effectual a bar as if the money had been paid according to the condition. The same statute, s. 13, allows the defendant in an action on a common money bond, who has not paid the amount due under the condition of the bond before action, to bring the principal and interest with costs into Court in full satisfaction and discharge of the bond; and by the 23 & 24 Vict. c. 126, s. 25, the payment into Court may be pleaded in the action (c).

Bonds with *special conditions* are now subject to the statute 8 & 9 Will. III. c. 11, the effect of which is to restrict the amount recoverable at law under the bond to the damages for the breaches of the

(a) Shepp. Touch. 367; 2 Bl. Com. 340.  
(b) *Ibid.*

(c) See Bullen & Leake, 'Precedents of Pleading,' 2nd edit. p. 96.

conditions which can be proved to have been broken, and to allow the judgment for the penalty to remain only as a security against further breaches (*a*). But the obligor is not answerable in the whole for more than the amount of the penalty (*b*).

**Effect of bond with condition.**—Hence a bond with a condition, in effect, binds the obligor to the performance of the condition, as if he had bound himself by a covenant to perform it; the bond being for some purposes a more convenient form for creating the liability.

No action can be maintained upon the bond until a breach of the condition; for the bond, it is said, “is a thing in action and executory, whereof no advantage can be taken until there be a default in the obligor” (*c*). And accordingly it is held that a bond with a condition creates a debt, not payable absolutely, but payable only on the contingency of a breach of the condition (*d*); and in an action on the bond, a plea showing that the condition has not been broken is a good plea (*e*). So also, as a cause of action on the bond first accrues upon a breach of the condition, the Statute of Limitations begins to run only from that date, and only as to that breach; and a new breach gives a new cause of action (*f*).

**Specific performance of condition of bond in equity.**—So in equity, bonds with special conditions are considered according to the intention of the parties, as agreements having the primary object of carrying out the condition, which may be enforced specifically, if the matter of the condition is within the jurisdiction of the Court; and they are not, in general, considered as giving an option of forfeiting the penalty instead of performing the condition (*g*).

**Consideration not necessary in contracts under seal.**—Contracts under seal have certain peculiar incidents, of which the following are the most important:—In contracts made by deed under seal, a consideration is not essential to give validity to the promise, as it is in the case of simple contracts (*h*). The object of the rule with simple contracts is to ensure an intention on the part of the promiser that his promise should be binding, and to avoid giving effect to promissory expressions which are not so intended. The same security is not required for contracts under seal, because a deliberate intention to make a binding promise seems to be sufficiently ensured by the formalities required to be gone through in the execution of a deed (*i*).

(*a*) See (*c*), p. 31.

(*b*) *Wilde v. Clarkson*, 6 T. R. 303; *Branscombe v. Scarbrough*, 6 Q. B. 13. And see as to relief against penalties, *post*, Chap. XV, “Damages.”

(*c*) Co. Litt. 206 *a*.

(*d*) *Cage v. Acton*, 1 L. Raym. 515; S. C. nom. *Gage v. Aston*, 1 Salk. 325; *Milbourn v. Ewart*, 5 T. R. 381.

(*e*) *Beswick v. Swindells*, 5 B. & Ad. 914; 3 A. & E. 868.

(*f*) *Sanders v. Coward*, 15 M. & W. 48; *Tuckey v. Hawkins*, 4 C. B. 655.

(*g*) *Chilliner v. Chilliner*, 2 Ves. sen. 528; *Howard v. Woodward*, 34 L. J. C. 47.

(*h*) 2 Bl. Com. 446; *Fallowes v. Taylor*, 7 T. R. 475, 477; *ante*, p. 3.

(*i*) See Plowden, 308.

**Gratuitous promises.**—It follows from a consideration not being essential in a contract under seal, that it is possible to make a gratuitous promise, or one without any consideration, in a manner which shall be binding on the promiser, by using the form of a deed ; although such a promise cannot be validly made in the form of a simple contract (a).

**Failure of consideration.**—As a consideration is not essential to the validity of a covenant or promise made under seal, the failure of the consideration, if in fact one exists, is not, in general, material to the validity of the covenant. Hence, in a deed between two parties containing covenants on both sides, although the covenants on the one side may form in fact, and may be stated to be, the consideration of the covenants on the other side, if the one party has executed the deed but the other party has not, the former may be bound by the covenants which he has executed although he has no remedy by action against the other party.

But in such case the mutual covenants may be so dependent on one another, either from the nature of their matter or by the construction of their terms, as to render the covenants on the one side conditional on the validity, or the performance, of the covenants on the other side ; and then the covenants on the one side are not absolutely binding until the fulfilment of the condition by the execution of the deed, or by the performance of the covenants on the other side (b). Thus, covenants in leases which depend on the interest in the lease and are made because the covenantor has that interest—such as those to repair and pay rent during the term,—are not obligatory if the lessor does not execute, not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate ; the foundation of the covenant failing, the covenant fails also. Unless there be a term granted, a covenant to repair during the term is void ; but with respect to collateral covenants not depending on the interest in the land, it is otherwise, and they are obligatory (c).

**Illegality of consideration.**—Though in a contract under seal the existence of a consideration is immaterial, yet if a consideration for the contract in fact exists, it must be a lawful one ; and if the consideration is unlawful the contract is void, and the illegality of the consideration may be alleged and proved even in contradiction of the written language of the deed (d).

(a) See *ante*, p. 3.

(b) *Rose v. Poulton*, 2 B. & Ad. 822 ; *Pitman v. Woodbury*, 3 Ex. 4, 11 ; *Morgan v. Pike*, 14 C. B. 473 ; *Northampton Gas Light Co. v. Parnell*, 15 C. B. 630 ; and see as to dependent covenants, *post*, Chap. XII.

(c) *Pitman v. Woodbury*, 3 Ex. 4 ;

*Cardwell v. Lucas*, 2 M. & W. 111 ; *Swatman v. Ambler*, 8 Ex. 72 ; and see *Pistor v. Cater*, 9 M. & W. 315 ; *Cooch v. Goodman*, 2 Q. B. 580 ; *Aveline v. Whisson*, 4 M. & G. 801 ; *How v. Greek*, 3 H. & C. 391 ; 34 L. J. Ex. 4.

(d) *Collins v. Blantern*, 1 Smith's L.

A contract under seal is considered as of a higher nature than a simple contract in respect of having better remedies annexed to it.

**Priority of contracts under seal in administration of assets.**—In the administration of the legal personal assets of a deceased debtor contracts under seal are entitled to priority over simple contracts; so that an executor or administrator is bound to discharge bonds, covenants, and other contracts under the seal of the deceased, out of such assets before liabilities created by simple contract (*a*). In the administration of the equitable assets, that is, such assets as can be reached only by means of a Court of Equity, there is no priority; but such assets are applied in discharging all liabilities *pari passu* (*b*).

**Remedy against heir and devisee.**—If in a contract under seal the covenantor or obligor expresses that he binds himself *and his heirs*, upon his death his heir becomes liable by the common law to discharge the contract to the extent of the lands or real assets descended to him from the covenantor or obligor (*c*). A contract which bound the heir taking lands by descent did not at common law give any remedy against a devisee of the lands; this was altered by the 3 Wm. & M. c. 14, for which the statute 1 Wm. IV. c. 47 has been substituted. These statutes have given a like remedy against a devisee to the extent of the lands devised (*d*). A creditor of the deceased by a debt binding the heir may proceed primarily against the heir or devisee in respect of the real assets of the deceased, notwithstanding the rule that the personal estate is the primary fund for the payment of debts; such rule applying only in equity, between the real and personal representatives of the deceased, and being enforced by entitling the heir or devisee in equity, after payment of the debt, to stand in the place of the creditor to reimburse himself out of the personal estate in the hands of the executor (*e*).

If the covenantor or obligor binds himself only and does not particularly express in the contract that he binds *his heirs* also, there is no remedy by action against the heir or devisee taking the land of the deceased covenantor or obligor, the only remedy by action being against the executor or administrator in respect of the personal estate as in the case of a simple contract, though the contract, being under seal, is entitled to be discharged out of the legal personal assets in priority to simple contracts.

**Real assets charged in equity with all simple and special con-**

C. 5th ed. 310; *Paxton v. Popham*, 9 East, 408; and see *post*, Chap. X, "Illegality."

(*a*) See Wms. Ex. 5th ed. 909.

(*b*) See *ib.* p. 1520.

(*c*) *Harbert's case*, 3 Co. Rep. 12 *a*; *Williams Ex.* 5th ed. 1526; and see *post*,

Chap. XVII, Sect. IV, "Assignment of Contracts by Death."

(*d*) As to the remedies against the heir and devisee, see *Bullen & Leake*, Prec. Pl. 2nd ed. 145.

(*e*) *Quarles v. Capell*, Dyer, 204, *b*; *Galton v. Hancock*, 2 Atk. 424, 426.

**tracts.**—But by the statute 3 and 4 Wm. IV. c. 104, the real assets of a deceased debtor are now charged in equity with the payment of all his debts whether created by simple contract or by contracts under seal, with a reservation of the priority of contracts under seal in which the heirs are bound (a). The statute enacts to the effect that when any person shall die entitled to any real estate which he shall not by his last will have charged with the payment of his debts, the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons as well debts due on simple contract as on specialty; and that the heir or devisee of such debtor shall be liable to the same suits in equity at the suit of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or devisee of any person was before the passing of that Act liable to at the suit of creditors by specialty in which the heirs were bound; provided always that in the administration of assets by Courts of Equity under that Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

**Period of limitation for contracts under seal.**—Another superiority in contracts under seal over simple contracts in respect to their remedies is given by the statutes of limitation. Where the cause of action arises out of a contract under seal, the period of limitation is, in general, twenty years; where it arises out of a simple contract, the period, in general, is six years (b).

There are some peculiar doctrines affecting contracts under seal which it is sufficient here merely to mention.

**Merger.**—A contract under seal being considered as of a higher nature than a simple contract operates in law in merger of a simple contract on the same matter; that is to say, if a bond or covenant under seal is given to secure a simple contract debt, the simple contract security is merged in the contract under seal and is thereby extinguished according to a general rule of law that a party, by acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security (c).

**Estoppel by deed.**—The doctrine of estoppel applies to all the recitals and statements made by a party in a deed under his hand and seal, and by virtue of it such recitals and statements are held conclusive against the party, and he is estopped from denying their truth, in any legal proceedings taken upon the deed between the same parties

(a) See *Richardson v. Jenkins*, 1 Drewry, 477.

(b) See *post*, Chap. XIII, Sect. XI,

“Statutes of Limitation.”

(c) See *post*, Chap. XIII, Sect. IX, “Merger.”

and in the same right, or those claiming through them ; but the estoppel does not extend to proceedings or purposes collateral to the deed (*a*).

**Release and alteration of deed.**—A contract under seal can be released, rescinded, or altered only by deed (*b*).

### SECTION III.—CONTRACTS OF RECORD.\*

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**Record.**—A record is an entry in rolls of parchment of the acts and proceedings of a Court of Record. A record is conclusive proof of its contents, and no averment or evidence is admissible to contradict it. But the existence of a record may be denied ; and the fact so disputed is then tried, not as facts ordinarily are tried by jury, but by inspection of the rolls of the Court, in order to see whether there is such record as is alleged and what are its contents (*c*). The enrolment or entry in the roll of the Court is essential to constitute the record and to give it its peculiar efficacy (*d*).

Contracts by record comprise Judgments, Recognizances, and Statutes merchant and staple.

**Judgments.**—The judgment of the Court in an action, when final, is entered upon the roll of the Court containing the record of the action. Where the judgment decides that the plaintiff shall recover against the defendant a certain sum of money as debt, or damages, or costs of suit, a contract is created by the judgment whereby the defendant is bound to pay that sum. So, where judgment is given for the defendant, and a sum of money is awarded by the judgment to be paid by the plaintiff to the defendant for his costs of suit, the judgment creates a contract for the payment of that sum (*e*).

A judgment, being a simple mode of embodying a contract, attended with easy proof and convenient remedies, is sometimes used for that purpose by agreement between the parties without any previous litigation ; also, where a suit has been commenced and is pend-

(*a*) *Doe d. Christmas v. Oliver*, 2 Smith's L. C. 5th ed. 634; *Duchess of Kingston's case*, *ib.* 642; *Petrie v. Nuttall*, 11 Ex. 569; *Metters v. Brown*, 1 H. & C. 686; 32 L. J. Ex. 138; *Carpenter v. Buller*, 8 M. & W. 209.

(*b*) *Countess of Rutland's case*, 5

Co. Rep. 26 *a*; *Blake's case*, 6 Co. Rep. 43 *b*; and see *post*, Chap. XIII, Sect. I.

(*c*) 3 Bl. Com. 331; Co. Lit. 117 *b*; 260 *a*; as to what are Courts of Record, see *ib.*; *Reg. v. Hughes*, L. Rep. 1 P. C. 81, 87.

(*d*) *Glynn v. Thorpe*, 1 B. & Ald. 153.

(*e*) 2 Bl. Com. 465.

\* Ch. I, Sect. III, Leake.

ing, the parties may come to an agreement respecting the entry up of judgment, and the terms on which it is to be enforced.

**Warrant of attorney. Cognovit actionem.**—A *warrant of attorney* is an instrument in writing, usually under seal (a), giving authority to enter up judgment against the party executing it, without process; it is commonly made subject to a *defeasance* prescribing the terms and conditions upon which the judgment may be entered and execution taken out. A *cognovit actionem* is an instrument in writing, confessing the cause of action in a pending suit, which authorizes the plaintiff to obtain judgment; it may also be made subject to terms and conditions controlling its application.

The judgment, whether given with the consent of the parties or *in invitum*, must be entered according to the forms and course of procedure of the Court in which it is entered up, and is accompanied with the regular incidents and consequences of a judgment; but a *warrant of attorney* or *cognovit actionem* authorizing the entering up of a judgment may be made subject to any terms or conditions which the parties agree upon as to the entering up of the judgment and putting it into execution, and thus create a binding contract between the parties which in effect modifies and controls the judgment and the execution upon it according to the terms of the instrument (b).

These instruments are subject to certain statutory regulations. The statute 1 & 2 Vict. c. 110, s. 9 enacts "that no warrant of attorney or cognovit actionem given by any person shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same and state that he subscribes as such attorney."

By the statute 3 Geo. IV. c. 39, ss. 1, 2, 3, a warrant of attorney or cognovit actionem, and the judgment and execution thereon, is to be deemed fraudulent and void against the assignees in bankruptcy of the party executing it, unless it shall have been filed under that Act within the space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on it within the same period (c).

And by the same statute, s. 4, "If such warrant of attorney or cognovit shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parch-

(a) It need not be under seal, except as to an authority to release errors. *Kinnersley v. Mussen*, 5 Taunt. 264; *Bruton v. Burton*, 1 Chit. 707.

(b) See *Wentworth v. Bullen*, 9 B. & C. 840, 848.

(c) See 12 & 13 Vict. c. 106, s. 136.

ment on which such warrant of attorney or *cognovit actionem* shall be written before the same shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be null and void to all intents and purposes." This section is interpreted as rendering the instrument void only against the assignees in bankruptcy, like the former sections, and not void between the parties to it (*a*).

**The remedies on judgments, execution.**—A judgment may be enforced by taking out execution according to the regular course of procedure. In the superior courts execution may, in general, issue within six years from the recovery of the judgment without a revival of it; but after the lapse of that interval, or upon the death of either of the parties, the judgment must be revived before execution can regularly issue (*b*).

**Action on judgment.**—A judgment may also be treated as a distinct contract on which a new action may be brought (*c*). An action of debt would formerly lie upon a judgment of the ancient county courts (*d*); but it is held that an action will not lie upon a judgment of a county court established by 9 & 10 Vict. c. 95, because such an action would be inconsistent with, and defeat the provisions of that statute as to the remedy on the judgment (*e*); nor can an action be brought in a county court on a judgment of a superior court (*f*). A decree of a court of equity to pay a sum of money founded on equitable grounds only, as a decree in a suit for the specific performance of an agreement, does not create a contract on which an action at law will lie (*g*). The judgments of foreign courts (including Irish, Scotch, and colonial judgments) are not records in this country and have not the same effect; but where they establish a debt between the parties an action may be brought to recover the amount as a simple contract debt.

The right to bring a new action upon a judgment is qualified by the statute 43 Geo. III. c. 46, s. 4, which enacts "that in all actions upon any judgment recovered, the plaintiff in such action on the judgment shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be

(*a*) *Morris v. Mellin*, 6 B. & C. 446, Holroyd, J., *dissentiente*; *Bennett v. Daniel*, 10 B. & C. 500, Parke, J., *dissentiente*; see *Bryan v. Child*, 5 Ex. 368. As to warrants of attorney and *cognovits* see 2 Chitty's Practice, 12th ed., 942, 949; Dixon's Lush's Practice, p. 800.

(*b*) C. L. P. Act, 1852, s. 128. The mode of reviving a judgment is by writ of *revivor* or by a suggestion entered upon the roll. C. L. P. Act, 1852, s. 129.

(*c*) *Williams v. Jones*, 13 M. & W. 628, 633, 634.

(*d*) *Read v. Pope*, 1 C. M. & R. 302; *Williams v. Jones*, 13 M. & W. 628.

(*e*) *Berkeley v. Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281; *Austin v. Mills*, 9 Ex. 288; 23 L. J. Ex. 40.

(*f*) 19 & 20 Vict. c. 108, s. 27.

(*g*) *Carpenter v. Thornton*, 3 B. & Ald. 52; and see *Henderson v. Henderson*, 6 Q. B. 288, 296; *Henley v. Soper*, 8 B. & C. 16, 20.



brought, or some judge in the same Court shall otherwise order." Such an order will not, in general, be made where the plaintiff might have realized his judgment by execution or otherwise (a).

The record of a judgment is conclusive as to its contents; consequently, in an action on a judgment, matter forming ground of error in the judgment cannot be pleaded by way of defence (b); nor can the pendency of proceedings in error be pleaded in bar to an action on a judgment (c); but the record may be amended or set aside by the Court which made it, or by the Court of error, upon sufficient grounds and upon regular proceedings being taken for that purpose (d).

**Effect of judgment in merger of the cause of action.**—A judgment merges or extinguishes the cause of action on which it is founded. "If there be a breach of contract or wrong done or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result; hence the legal maxim, '*transit in rem judicatam*'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher" (e). If another action is brought for the same cause, the judgment recovered against the defendant in respect of that cause of action may be pleaded in bar in the second action (f).

**Effect of judgment in estoppel.**—So, a judgment recovered against the plaintiff in an action, if the judgment be given upon the merits of the case, operates as an estoppel against the plaintiff bringing another action for the same cause, and may be pleaded in bar to such action (g).

**Effect of judgments in charging lands of debtor.**—By the statute 1 & 2 Vict. c. 110, s. 13 it is enacted to the effect, that a judgment entered up against any person in any of the superior courts at Westminster shall operate as a charge upon all lands, tenements, and hereditaments to which such person shall at the time of entering up such judgment or at any time afterwards be entitled, and shall be binding

(a) *Hanmer v. White*, 12 M. & W. 519; *Adams v. Ready*, 6 H. & N. 261; *Dickinson v. Angell*, 3 B. & S. 840; 32 L. J. Q. B. 183; and see further as to this section 1 Chitty's Practice, 12th ed., 494; Lush's Practice by Dixon, 897.

(b) *Dick v. Tolhausen*, 4 H. & N. 696.

(c) *Snook v. Mattock*, 5 A. & E. 239, 248; *Riddle v. Grantham Canal Nav.*, 16 M. & W. 882.

(d) Per Lord Mansfield, C.J., 2 Burr. 1005, 1009; and see *De Medina v. Grove*, 10 Q. B. 152.

(e) Per Parke, B., *King v. Hoare*, 13 M. & W. 494, 504.

(f) *Smith v. Nicholls*, 5 Bing. N. C. 208, 220; *Todd v. Stewart*, 9 Q. B. 759.

(g) *Vooght v. Winch*, 2 B. & Ald. 662; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877.

as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and every judgment creditor shall have the same remedies in a court of equity against the hereditaments so charged as he would be entitled to in case the judgment debtor had power to charge the same, and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon. The same statute, s. 19, provides that no judgment shall by virtue of that Act affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until such judgment shall have been registered in the manner therein provided; and the statute 3 & 4 Vict. c. 82, s. 2 further provides that no judgment shall by virtue of the above Act affect any lands as to purchasers, mortgagees, or creditors unless and until registration, "any notice of any such judgment to any such purchaser, mortgagee, or creditor in anywise notwithstanding."

The statute 18 Vict. c. 15, s. 4 enacts that no judgment which might be registered under the said Act 1 & 2 Vict. c. 110 shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until it shall have been registered according to that Act, any notice notwithstanding. This enactment takes away the effect which the judgment had against purchasers, mortgagees, or creditors without registration, independently of the statute 1 & 2 Vict. c. 110.

By the statute 2 & 3 Vict. c. 11, s. 4 it is enacted that all judgments registered under the 1 & 2 Vict. c. 110 shall after the expiration of five years be null and void against lands as to purchasers, mortgagees, and creditors, unless registered within five years in the manner therein provided.

By the statute 23 & 24 Vict. c. 38, s. 1 it is enacted that no judgment to be entered up after the passing of that Act shall affect any land as to a *bona fide* purchaser for valuable consideration or mortgagee, whether such purchaser or mortgagee have notice or not of such judgment, unless a writ or other due process of execution of such judgment shall have been issued and registered as therein provided, and shall be executed and put in force within three months from the time when it was registered.

And the statute 27 & 28 Vict. c. 112, s. 1, in order to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, enacts that no judgment to be entered up after the passing of that Act shall affect any land, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment.

**Revival of judgment against heir.**—Upon the death of a judg-

ment debtor his real assets may be charged in execution by taking the proper proceedings to revive the judgment against the heir and tenants of the lands; but the heir is chargeable as tenant of the lands only and not as heir, and is not liable to an action on the judgment as he is on a contract under seal of the ancestor in which he is expressly named (*a*).

**Priority of judgment debt.**—A judgment also gives the judgment creditor priority in the administration of the assets of the deceased judgment debtor over creditors by contracts under seal and by simple contracts (*b*); subject to the statute 23 & 24 Vict. c. 38, s. 3, which enacted to the effect that no judgment which had not then been or which should not thereafter be registered, under the Acts in force for that purpose, so as to bind lands as against purchasers, mortgagees, or creditors, should have any preference against heirs, executors, or administrators in their administration of their ancestor's, testator's, or intestate's estates (*c*).

**Recognizance.**—A recognizance is a writing obligatory acknowledged before a judge or other officer having authority for that purpose, and enrolled in a Court of Record. It is conditioned to secure various objects, as to appear at the assizes, to keep the peace, to become bail for the defendant in an action. A recognizance is proved by the record, and the remedy upon it is by writ of *scire facias* or by action. It operates as a charge upon the lands of the party bound from the time of enrolment on record; and it takes precedence in the administration of assets after judgment debts, but before contracts under seal (*d*).

**Statute merchant, statute staple, and recognizance in nature of statute staple.**—Statutes merchant, statutes staple, and recognizances in the nature of a statute staple were acknowledgments of debt made in writing before officers appointed for that purpose, and enrolled of record. They bound the lands of the debtor; and execution was awarded upon them upon default in payment without the ordinary process of an action. These securities were originally introduced for the encouragement of trade, by providing a sure and speedy remedy for the recovery of debts between merchants, and afterwards became common assurances, but have now become obsolete and therefore require no further mention (*e*).

(*a*) See *ante*, p. 34 *Jefferson v. Morton*, 2 Wms. Saund. 7 (4); *Chitty's Practice*, 12th ed., 1127.

(*b*) *Williams on Executors*, 5th ed., 898; 2 Bl. Com. 511.

(*c*) See *Fuller v. Redman*, 26 Beav. 600; 29 L. J. C. 324; *In re Rigby*, 33 L. J. C. 149; *In re Turner*, 33 L. J. C. 232; *Evans v. Williams*, 2 Drew. & Sm. 324;

34 L. J. C. 661; *Kemp v. Waddingham* L. Rep. 1 Q. B. 355; 35 L. J. Q. B. 114.

(*d*) Bacon, Abr. tit. "Execution" (B); 2 Bl. Com. 341; *Williams' Executors*, 5th ed., 905.

(*e*) As to these forms of contract see Bacon, Abr. tit. "Execution" B; *Underhill v. Devereux*, 2 Wms. Saund. 68; *Williams' Executors*, 5th ed., 905.

**Debts created by statute.**—Debts are sometimes created by statutes, as debts for penalties imposed by penal statutes and payable to an informer or to a party grieved, debts for calls under the Joint Stock Companies Acts, debts for tolls payable under statutes, and others. Such debts cannot strictly, in respect of their origin, be referred to either of the forms of contract recognized by common law, which are mentioned above. Being the creatures of statute law, their form and incidents are those imposed by the statute which creates them, and must be sought in the particular provisions of the statute (*a*).

Accordingly, it has been held that an action by a company for calls under the Companies Clauses Consolidation Act is not an action on a contract without specialty within the meaning of the Statute of Limitations (21 Jac. I. c. 16, s. 3) prescribing six years as the limit for such actions (*b*); and it has also been held that such calls are to be allowed as specialty debts in the administration of the assets of a deceased shareholder (*c*).

It was held in the full Court of Appeal in Chancery that a call made upon a member of a company as a contributory under the provisions of the Winding Up Act of 1848 (11 & 12 Vict. c. 45, s. 83) did not take priority as a specialty debt over simple contract debts in the administration of assets (*d*). “The Joint Stock Companies Act, 1857,” 20 & 21 Vict. c. 14, s. 13, enacted that calls made on a contributory should be deemed to be specialty debts due from such contributory to the company; and “the Companies Act, 1862,” 25 & 26 Vict. c. 89, s. 75, has enacted to the same effect.

A debt for calls by a company founded on colonial statutes, so far as it is recognized in this country, is a simple contract debt.

An action under the statute 1 Ric. II. c. 12, which gave to creditors an action of debt against the sheriff upon the escape of a prisoner out of execution to recover the sum for which he was charged in execution (since altered by statute 5 & 6 Vict. c. 98, s. 31, to an action only for the damages sustained), was held not to be an action on contract without specialty, and so not barred by the 21 Jac. I. c. 16, s. 3, after six years (*e*). An action for tolls payable under a statute by the owners of shipping passing a harbor was held to be an action on a specialty within the meaning of the Statute of Limitations, 3 & 4 Wm. IV. c. 42, s. 3, which might be brought at any time within twenty years (*f*).

(*a*) As to a debt under a bye-law, see *Tobacco Pipe Makers' Co. v. Loder*, 16 Q. B. 765.

(*b*) *Cork & Bandon Railway Co. v. Goode*, 13 C. B. 826.

(*c*) *Wentworth v. Chevill*, 26 L. J. C. 760.

(*d*) *Robinson's case*, 3 Sm. & Gif. 272;

6 D. M. & G. 572; 26 L. J. C. 95; see as to this liability, *Williams v. Harding*, Law Rep. 1 H. L. 9.

(*e*) *Jones v. Pope*, 1 Wms. Saund. 37.

(*f*) *Shepherd v. Hills*, 11 Ex. 55; 25 L. J. Ex. 6.

SECTION IV.—THE STATUTE OF FRAUDS.

§ 1. CONTRACTS WITHIN THE STATUTE.\*

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**Contracts within the Statute of Frauds.**—The sections of the Statute of Frauds, 29 Car. II. c. 3, relating to contracts are the fourth and the seventeenth sections.

The fourth section enacts “that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

The seventeenth section enacts “that no contract for the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

It is proposed to consider :—§ 1. The contracts within the meaning of these sections.—§ 2. The forms and conditions required by these sections in order to take such contracts out of their operation.—§ 3. The effect of these sections upon contracts coming within their operation.

**Promise by executor or administrator to answer damages out of his own estate.**—The executor or administrator of a deceased person, as such, is liable to answer damages in respect of the liabilities of the testator or intestate only to the extent of the assets which come to his hands, to be administered in due course; but he may give a

\* Ch. I, Sect. V, § 1, Leake.

special promise to answer such damages out of his own estate. Such a promise is within the statute, and, in addition to the requirements generally necessary to render it binding as a contract, must satisfy the forms required by the statute (a).

A promise by an executor or an administrator to pay a debt of the testator or intestate out of his own estate is void, unless made upon a sufficient consideration. A promise to pay as executor is merely an acknowledgment of his liability in that character, and does not bind him personally (b). Forbearance by a creditor of the deceased's estate to sue the executor or administrator, as such, would form a sufficient consideration to support a promise made by the executor or administrator, in his own right, in respect thereof (c). A promissory note given by executors in the following form:—"As executors we severally and jointly promise to pay, etc. on demand together with lawful interest for the same," was held to render the executors personally liable; because the stipulation for interest imported payment at a future day, and a corresponding forbearance as a consideration (d).

An executor or administrator cannot be sued at law for a legacy or distributive share of the deceased's estate, the only remedy being in a court of equity; and a promise by the executor and administrator to pay such legacy or share would be void unless made upon a valid consideration (e). Forbearance of a suit for a legacy has been held a sufficient consideration to render a promise by the executor to pay the legacy, made in respect of such consideration, binding upon him personally (f); and if the executor or administrator admits to the legatee or person entitled that he has received the money and holds it for the use of the latter, he may become liable upon such admission to an action at law for money received or upon an account stated (g).

**Promise to answer for the debt, default or miscarriage of another.**—There must be a separate liability in the other person which the promise answers for. Thus, if goods are sold by the plaintiff to another, who becomes debtor for the price, and the defendant

(a) *Rann v. Hughes*, 7 T. R. 350, (a); and see *Philpot v. Briant*, 4 Bing. 717; 1 Wms. Saund. 211 (2).

(b) *Rann v. Hughes*, 7 T. R. 350, (a); *Williams' Executors*, 5th ed. 1610; *Forth v. Stanton*, 1 Wms. Saund. 210; notes to *Barber v. Fox*, 2 Ib. 137 b.

(c) See the cases cited in *Williams' Executors*, 5th ed. 1612; *Hume v. Hinton*, cited in *Jones v. Ashburnham*, 4 East, 455, 464.

(d) *Childs v. Monins*, 2 B. & B. 460; and see *Ridout v. Bristow*, 1 C. & J. 231; *Serle v. Waterworth*, 4 M. & W. 9; *Nelson v. Serle*, ib. 795.

(e) *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 542.

(f) *Davis v. Reyner*, 2 Lev. 3; and see *Deeks v. Strutt*, 5 T. R. 690, 693.

(g) *Hart v. Minors*, 2 C. & M. 700; *Topham v. Morecraft*, 8 E. & B. 972.

promises to pay that debt, the promise is within the statute (*a*); but if goods are supplied to another upon the sole credit of the defendant and upon his sole promise to pay for them, the promise is not within the statute, because there is no liability of another answered for (*b*); so also, if goods are supplied to another upon the terms of payment by a bill accepted by the defendant (*c*). A promise to pay for goods supplied to an infant, not being necessities, is not within the statute, because the infant is not liable (*d*).

The plaintiff had sold goods to another who had sold them to the defendant, but the plaintiff retained a lien upon the goods for the original contract price, and thereupon it was agreed between the plaintiff and the defendant that in consideration of the plaintiff giving up his lien on the goods the defendant would pay the plaintiff the price; it was held that such contract did not constitute the undertaking of the debt of another within the statute (*e*). An agreement that in consideration that the plaintiff would sell and deliver certain goods to the buyer, the defendant would discount the acceptances of the buyer of bills drawn by the plaintiff for the price, and protect the plaintiff from the bills when they became due, was held to be within the statute (*f*).

The undertaking of a *del credere* agent, whereby he becomes responsible to his employer for the solvency of the persons with whom he deals, is not within the statute, being a guarantee of his own conduct in making sales and accepting purchasers, and not a promise to answer for the debt of another person, though in the event it may become so (*g*).

The debt, default or miscarriage of another person intended by the statute may be future or contingent, and it is not necessary that it should have become absolute at the time of making the promise to answer for it; thus, a promise to answer for the debt of another for goods to be supplied to him in future is within the statute (*h*).

A promise by the defendant to give a guarantee for another is as much within the statute as the guarantee itself (*i*). But a promise to procure a guarantee for the debt of another is not within the statute,

(*a*) *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120.

(*b*) *Simpson v. Penton*, 2 C. & M. 430; *Andrews v. Smith*, 2 C. M. & R. 627; and see *Wood v. Benson*, 2 C. & J. 95; *Birkmyr v. Darnell*, 1 Salk. 27; 1 Smith's L. C. 5th ed. 262; *Forth v. Stanton*, 1 Wms. Saund. 211; *Browning v. Stallard*, 5 Taunt. 450.

(*c*) *Taylor v. Hilary*, 1 C. M. & R. 741.

(*d*) *Harris v. Huntbach*, 1 Burr. 373.

(*e*) *Fitzgerald v. Dressler*, 7 C. B. N.

S. 374; 29 L. J. C. P. 113; and see 1 Wms. Saund. 211 *e* (note).

(*f*) *Mallett v. Bateman*, 1 H. & R. 109; 33 L. J. C. P. 243; 35 *ib.* 40; L. R. 1 C. P. 163.

(*g*) *Couturier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97; and see per Cowen, J., *Wolff v. Koppell*, 5 Hill, N. Y. Rep. 458, cited *ib.*

(*h*) See *Thomas v. Williams*, 10 B. & C. 664; and see *Green v. Cresswell*, 10 A. & E. 453, 459.

(*i*) See *Mallett v. Bateman*, 1 H. & R. 109; 35 L. J. C. P. 40; L. R. 1 C. P. 163.

though the guarantee itself would be. A ship-owner, whose ship had been chartered, refused to let it sail until he obtained security for the freight, whereupon the defendant promised, in consideration of the plaintiff allowing the ship to sail, to procure a third party to sign a written guarantee for the freight for which the charterer would be liable; it was held that the promise of the defendant was not within the statute (*a*).

**Promise to answer for debt made in consideration of discharging the debtor.**—A promise made by the defendant to pay the debt of another, in consideration of the latter being discharged from the debt, is not within the statute, because there remains no separate liability of another for which the defendant promises to answer (*b*); as a promise by the defendant to pay a debt of another, who has been taken in execution for it, on condition of his discharge, because by the discharge from execution the original debt is extinguished (*c*). So, where a landlord, entitled to distrain his tenant's goods for arrears of rent, assigns his lien upon the goods to another who, in consideration thereof, promises to pay the rent, the promise is not within the statute; because the debt for rent is suspended by the landlord's having recourse to his right of distress (*a*). But a promise, made in consideration of the landlord abandoning a distress for rent due from his tenant, to pay the rent then due, and also to guarantee future rent from the tenant for which the landlord could not then distrain, was held to be within the statute; because the tenant continued liable for the future rent (*e*). So, where an assignment of a debt is accepted in discharge of a debt owing from the assignor to the assignee, and the debtor promises to pay the assignee instead of his original creditor, the assignor, such promise is not within the statute, because the debt of the assignor to the assignee is thereby extinguished (*f*).

**Promise to answer for debt, where the promisee is not the creditor.**—The statute intends only promises made to the person to whom another is liable for the debt, default or miscarriage for which the promise answers. A promise made to a debtor to answer for the debt for which he himself is liable is not within the statute (*g*). A promise made to a person to indemnify him against the costs of an action which he might become liable to pay is not within the statute (*h*). The defendant assigned to the plaintiff the benefit of a con-

(*a*) *Bushell v. Beavan*, 1 Bing. N. C. 103.

(*b*) See 1 Wms. Saund. 211 *b*, (*f*); 211 *e*.

(*c*) *Goodman v. Chase*, 1 B. & Ald. 297; *Bird v. Gammon*, 3 Bing. N. C. 883; *Butcher v. Stewart*, 11 M. & W. 857; and see *Lane v. Burghart*, 1 Q. B. 933.

(*d*) *Williams v. Leper*, 3 Burr. 1886;

*Edwards v. Kelly*, 6 M. & S. 204; *Bampton v. Paulin*, 4 Bing. 264.

(*e*) *Thomas v. Williams*, 10 B. & C. 664.

(*f*) *Hodgson v. Anderson*, 3 B. & C. 842; and see *post*, Chap. XVII, "Assignment of Contracts."

(*g*) *Thomas v. Cook*, 8 B. & C. 723; *Eastwood v. Kenyon*, 11 A. & E. 438.

(*h*) *Adams v. Dansey*, 6 Bing. 506.



tract which he had made with another, and guaranteed to the plaintiff the due performance of the contract; the promise of the defendant was held not to be within the statute, because the liability guaranteed by it was not owed to the plaintiff (a).

An indemnity given to a person for becoming bail for the appearance of another on a criminal charge is not within the statute, because there is no debt or duty owing from the person bailed to the person who becomes bail (b). But an indemnity given to the surety in a bail bond in a civil action was held to constitute a promise within the statute to answer for the default of the principal debtor; which decision, it seems, is to be supported, if at all, on the ground that in civil proceedings there is a legal duty in the person bailed towards his bail to keep him harmless by surrendering or paying the debt (c). The plaintiff, the bailiff of a county court, having arrested a person for non-payment of a judgment debt, released him upon the promise of the defendant to pay the plaintiff the amount on a certain day or surrender the debtor; it was held that the promise was not within the statute, because the debt answered for was not owing to the promisee (d).

**Default and miscarriage.**—The terms *default* and *miscarriages* comprehend wrongful acts creating a liability for damages which are not breaches of contract. Thus, a person having wrongfully damaged the plaintiff's horse, a promise by the defendant to the plaintiff to pay the damage was held to be a promise within the statute (e). A declaration alleged that the defendant promised the plaintiff to pay a sum of money, in consideration of the plaintiff withdrawing the record in an action of assault brought by the plaintiff against another; the promise, as alleged, was held not to be within the statute, on the ground that it did not appear that the latter person had committed the assault or was liable for damages (f).

**Consideration for the promise not required to appear in writing.**—Contracts containing promises within the description here in question have been excepted from the operation of the statute, so far as the consideration is concerned, by the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97) s. 3, which provides that such contracts, satisfying the requirements of the Statute of Frauds in other respects, shall not be deemed invalid by reason only that the consideration for the promise does not appear in writing (g).

(a) *Hargreaves v. Parsons*, 13 M. & W. 561.

(b) *Cripps v. Hartnoll*, 2 B. & S. 697; 4 *ib.* 414; 31 L. J. Q. B. 150; 32 *ib.* 381.

(c) *Green v. Cresswell*, 10 A. & E. 453; and see *Cripps v. Hartnoll*, *supra*; *Reader v. Kingham*, 13 C. B. N. S. 344,

355; 32 L. J. C. P. 108, 110.

(d) *Reader v. Kingham*, 13 C. B. N. S. 344; 32 L. J. C. P. 108.

(e) *Kirkham v. Marter*, 2 B. & Ald. 613.

(f) *Read v. Nash*, 1 Wils. 305.

(g) See *post*. p. 60.

**Agreement made upon consideration of marriage.**—Agreements consisting of mutual promises to marry are held not to be here intended (*a*). An agreement to pay money, or make a settlement, in consideration of marriage is within the statute (*b*).

**Representations made to induce marriage.**—If a person in order to induce a marriage makes a representation of facts, upon the faith of which the marriage takes place, he is held bound in equity to make good the representation (*c*). The liability of the person making such representation rests upon the ground that it would be a fraud if the facts were not as represented, and not upon the ground of contract; therefore it is not required that the representation should be in writing under the statute in order to render him responsible for them (*d*). But representations respecting matters of future intention to be performed upon a marriage are equivalent to promises, and are within the statute; consequently writing is necessary to establish them, notwithstanding the marriage may have taken place upon the faith of their performance (*e*).

**Contract or sale of any interest in land. Tenancies and occupation of land.**—A contract to take or give the tenancy of a house (*f*); a contract by the plaintiff to surrender a tenancy in favor of the defendant and to endeavor to prevail on the landlord to accept him as tenant (*g*); a contract to assign a tenancy (*h*); a contract to give up immediate possession of a house which the person occupied under an agreement for a lease (*i*); a contract for the sale of a business, as a milkwalk, or a brickyard, with possession of the premises where it is carried on (*j*), come within this description.

An agreement made between a lessor and a lessee of premises, pend-

(*a*) *Harrison v. Cage*, 1 L. Raym. 386; *Cork v. Baker*, 1 Strange, 34, overruling *Philpot v. Wallet*, 3 Lev. 65.

(*b*) *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Str. 236; *Randall v. Morgan*, 12 Ves. 73; *Barkworth v. Young*, 4 Drew. 1; 26 L. J. C. 153; *Shadwell v. Shadwell*, 9 C. B. N. S. 159; 30 L. J. C. P. 145; *Caton v. Caton*, 34 L. J. C. 564; L. Rep. 1 Ch. Ap. 137.

(*c*) *Montefiori v. Montefiori*, 1 W. Bl. 363; *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Hamersley v. De Biel*, 12 Cl. & F. 45; 3 Beav. 469; *Bold v. Hutchinson*, 5 De G. M. & G. 558; 24 L. J. C. 235; 25 ib. 598.

(*d*) *Id.*; *Jorden v. Money*, 5 H. L. C.

185; 23 L. J. C. 865; *Prole v. Soady*, 2 Giff. 1; 29 L. J. C. 721.

(*e*) *Jorden v. Money*, *supra*; *Montacute v. Maxwell*, 1 P. Wms. 618; *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76; 26 L. J. C. 427; 27 ib. 190; and see *De Biel v. Thompson*, 3 Beav. 469; *Webster v. Webster*, 27 L. J. C. 115.

(*f*) *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766.

(*g*) *Cocking v. Ward*, 1 C. B. 858.

(*h*) *Buttemere v. Hayes*, 5 M. & W. 456.

(*i*) *Kelly v. Webster*, 12 C. B. 283.

(*j*) *Smart v. Harding*, 15 C. B. 652; 24 L. J. C. P. 76; *Hodgson v. Johnson*, E. B. & E. 685; 23 L. J. Q. B. 88; and see *Green v. Saddington*, 7 E. & B. 603.

ing the lease, for the former to lay out a sum of money in improvements, and the latter to pay a sum every year in addition to the rent, was held not to be within the statute; because no additional interest in the land was given to the lessee beyond his previous interest under the lease, nor was any additional interest in the land given to the lessor, the annual payment not being in the nature of rent reserved, or charged upon the land (*a*).

An agreement for apartments in a house which, if executed, would create a tenancy of the apartments is within the statute (*b*); but an agreement merely for board and lodging, not stipulating for the tenancy of any specific room, is not within the statute (*c*).

**Auction.**—A sale of land by auction is a contract within the statute (*d*).

**Mortgages.**—The equity of redemption of land which has been mortgaged is an interest in land within the statute, and a contract made respecting it must be in writing (*e*). An equitable mortgage by deposit of title deeds is not within the statute, and creates an interest in the land in equity without any written evidence of the contract, because the contract is executed by the deposit of the deeds (*f*); but an agreement to make an equitable mortgage by deposit of deeds is within the statute, and is not binding unless in writing (*g*).

A contract for the purchase of a bond granted by the Westminster Improvement Commissioners under a statute, which gave to the bondholder the benefit of a mortgage of the lands purchased by the commissioners, was held to be within the statute (*h*).

A contract to pay the costs of investigating the title to land upon a proposed mortgage, in case the title should turn out defective, was held not to be within the statute (*i*).

**Shares in Companies.**—A share in a joint stock company or copartnership, where real estate is held by the company, or by trustees for the purposes of the company, but the shareholders as such have no specific interest in the land, being entitled only to a share of the profits to be made by the business, is not an interest in land within the statute; as a share in a joint stock banking company holding real estate (*j*), a share in a railway company (*k*), a share in a cost-book mining company (*l*); and such shares are not within the description

(*a*) *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899.

(*b*) *Inman v. Stamp*, 1 Stark. 12; and see *Edge v. Strafford*, 1 C. & J. 391.

(*c*) *Wright v. Stavert*, 2 E. & E. 721; 29 L. J. Q. B. 161.

(*d*) *Walker v. Constable*, 1 B. & P. 306; *Hinde v. Whitehouse*, 7 East, 558.

(*e*) *Massey v. Johnson*, 1 Ex. 241, 255.

(*f*) *Russel v. Russel*, 1 Bro. C. C. 269; 1 White & Tudor, L. C. 2nd ed. 541.

(*g*) *Ex parte Coombe*, 4 Madd. 249.

(*h*) *Toppin v. Lomas*, 16 C. B. 145; 24 L. J. C. P. 144.

(*i*) *Jeakes v. White*, 6 Ex. 873.

(*j*) *Humble v. Mitchell*, 11 A. & E. 205.

(*k*) *Tempest v. Kilner*, 3 C. B. 249; *Bradley v. Holdsworth*, 3 M. & W. 422.

(*l*) *Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53; *Powell v. Jessop*, 18 C. B. 336; 25 L. J. C. P. 199; and see *Caddick v. Skidmore*, 2 De G. & J. 52; 27 L. J. C. 153.

of "goods, wares, and merchandise," contained in the 17th section (*a*).

**Fixtures.**—The property in fixtures, that is to say, things annexed to the freehold but subject to a right of removal in the tenant, while they remain fixed to the land, constitutes an interest in land; so that such fixtures cannot be recovered in an action of trover (*b*); nor can the price of them be recovered under a count for goods sold and delivered (*c*); after severance they become goods and chattels (*d*). The right of removing fixtures is not an interest in land within the statute, and may be assigned without writing (*e*); nor is it within the description of "goods, wares, and merchandise," contained in the 17th section of the statute (*f*).

**Emblements and the produce of land.**—The sale of emblements, or the annual growing crops sown by the tenant of land (*g*), is not considered as a contract concerning an interest in the land for the purpose of the statute (*h*). An agreement for the sale of a growing crop of potatoes is not a contract for an interest in land within the fourth section of the statute (*i*); so, a sale of growing crops of corn (*j*); but these contracts are within the 17th section of the statute as being sales of goods (*k*). It has been held that a contract for the sale of growing crops of hops was not merely a sale of goods, but gave an interest in the land within the fourth section (*l*); also that a sale of a growing crop of turnips was within the fourth section (*m*); but these cases, it is said, would now probably be decided differently (*n*).

A contract for the sale of a growing crop of grass, being a natural and permanent crop and not coming within the description of emblements, is a contract for an interest in land within the statute and must be in writing (*o*); so, a contract for the sale of a growing crop of trees or underwood (*p*). A contract for the sale of crops of fruit, growing on fruit trees, was held to be a contract for the sale of an interest in land within the Stamp Act (*q*).

Where a contract is made for the tenancy or possession of land, to-

(a) See *post*, p. 54.

(b) *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184; *Wilde v. Waters*, 16 C. B. 687.

(c) *Lee v. Risdon*, 7 Taunt. 188; *Hallen v. Runder*, 1 C. M. & R. 266, 276.

(d) *Ib.*; *Dalton v. Whittem*, 3 Q. B. 961.

(e) *Hallen v. Runder*, *supra*.

(f) *Ib.*; and see *Horsfall v. Hey*, 2 Ex. 778.

(g) See Co. Lit. 55 a, b; *Williams*, Ex. 5th ed. 630.

(h) 1 Wms. Saund. 277 b, n. (f).

(i) *Evans v. Roberts*, 5 B. & C. 829; *Sainsbury v. Matthews*, 4 M. & W. 343.

(j) *Jones v. Flint*, 10 A. & E. 753.

(k) *Post*, p. 54; *Evans v. Roberts*, *supra*; and see *Smith v. Surman*, 9 B. & C. 561.

(l) *Waddington v. Bristow*, 2 B. & P. 451.

(m) *Emmerson v Heelis*, 2 Taunt. 38.

(n) See *Evans v. Roberts*, 5 B. & C. 829, 835; *Rodwell v. Phillips*, 9 M. & W. 501, 503; *Jones v. Flint*, 10 A. & E. 753, 759.

(o) *Crosby v. Wadsworth*, 6 East, 602; *Evans v. Roberts*, 5 B. & C. 829, 832; *Shelton v. Livius*, 2 C. & J. 411; *Carrington v. Roots*, 2 M. & W. 248.

(p) *Scorell v. Bozall*, 1 Y. & J. 396; *Teal v. Auty*, 2 B. & B. 99.

(q) *Rodwell v. Phillips*, 9 M. & W. 501

gether with the growing crops left upon the land, and the benefit of work, labor, and materials previously expended in tilling the land, though the crops and tillages may be agreed to be paid for at a separate valuation, they are considered as forming part of the land, and the contract must be in writing (a).

A contract for the sale of the produce of land, to be taken as goods, does not give any interest in the land, though it is not severed from the land at the time of the contract; as a contract for the sale of potatoes, then being in the ground, at so much per sack, or so much per acre (b). A contract for the sale of timber at so much per foot, being the produce of certain trees then growing, when they should be cut down, was held not to be a contract for the sale of the growing trees, and therefore not to give any interest in the land (c). A contract for the right to feed cattle on certain land was held to be a contract for the agistment of cattle, and not to give an interest in the land (d).

**Licenses to enter land.**—Such contracts are not brought within the fourth section, as giving an interest in land, merely because they give to the purchaser a license to come upon the land to take the produce (e). A license to enter land conveys no interest in the land; it only renders the entry lawful which would otherwise be unlawful (f). A parol license coupled with a valid grant is irrevocable, by reason of the grant which the grantor cannot defeat (g); thus, where a quantity of hay, being upon a person's land, was sold by him upon the terms that the purchaser might enter upon the land to remove it when he liked within a certain time, the license to enter the land was held to be irrevocable (h); but where an agreement was made without writing for the sale of a growing crop of grass, with liberty to enter the land for the purpose of cutting and taking it, the license was held to be revocable, because the vendor could not be charged with such a contract without writing (i).

**Agreement not to be performed within a year.**—By this description is intended such contracts as are incapable of being completely performed within the year (j). A contract of service for a

(a) *Earl Falmouth v. Thomas*, 1 C. & M. 89; and see *Mayfield v. Wadsley*, 3 B. & C. 357.

(b) *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 205.

(c) *Smith v. Surman*, 9 B. & C. 561.

(d) *Jones v. Flint*, 10 A. & E. 753.

(e) See *Smith v. Surman*, 9 B. & C. 561, 573.

(f) *Wood v. Leadbitter*, 13 M. & W. 838, 844; and see *Winter v. Brockwell*,

8 East, 308, 310 (a); *Hewlins v. Shippam*, 5 B. & C. 221.

(g) *Wood v. Leadbitter*, 13 M. & W. 838, 845.

(h) *Wood v. Manley*, 11 A. & E. 37.

(i) *Carrington v. Roots*, 2 M. & W. 248; ante, p. 50; and see *Crosby v. Wadsworth*, 6 East, 602.

(j) See *Boydell v. Drummond*, 11 East, 142.

term of more than a year is within the statute (*a*). A contract for a year's service, to commence at a future day, cannot be performed within the year and is within the statute (*b*). Where parties after a yearly hiring continue the service by common consent without express agreement, a fresh hiring for a year is implied from the expiration of the first year, and such hiring is not within the statute (*c*).

A contract to pay an annuity for five years is within the statute (*d*); so, a contract for a partnership for ten years (*e*). A contract contained in a prospectus to publish by subscription a series of prints of scenes from Shakespeare's plays, seventy-two in number, to be published in parts containing four prints at the price of three guineas, one part at least to be published annually, was held to be a contract not to be performed within a year (*f*). A contract by which the incumbent of a parish engaged a curate, to be paid by an annual grant made by a society, and undertook to apply in each and every year according to the rules of the society for the payment of the grant to the curate, was held to be within the statute (*g*).

**Contracts which may be performed within the year.**—Contracts which may be performed within the year are not within the statute; and contracts, the performance of which depends upon a contingency which may happen within the year, are not within the statute. A promise to pay money upon the return of a ship, which might return within a year, was held not to be within the statute, although the ship in fact did not return within two years (*h*). So, an agreement in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage was held not to be within the statute, though the marriage did not take place within a year (*i*). So, an agreement to leave money by will (*j*); a promise by a person that his executor shall pay a sum of money (*k*); and a contract to pay a guinea a day during the life of a person (*l*), are not within the statute. A contract by the defendant to pay the plaintiff one guinea per month for the maintenance of a child, to continue so long as the defendant should think proper, was held not to be within the statute (*m*).

The statute includes only those contracts which cannot be performed within a year on either side; contracts which may be per-

- (*a*) *Giraud v. Richmond*, 2 C. B. 835.
- (*b*) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; and see *Cawthorn v. Cordrey*, 13 C. B. N. S. 406; 32 L. J. C. P. 152.
- (*c*) *Beeston v. Collyer*, 4 Bing. 509.
- (*d*) *Sweet v. Lee*, 3 M. & G. 452.
- (*e*) *Williams v. Jones*, 5 B. & C. 108, 110.
- (*f*) *Boydell v. Drummond*, 11 East,

142; and see *Mavor v. Pyne*, 3 Bing. 285.

- (*g*) *Roberts v. Tucker*, 3 Ex. 632.
- (*h*) *Anonymous*, 1 Salk. 280.
- (*i*) *Peter v. Compton*, Skinner, 353; 1 Smith's L. C. 5th ed. 283.
- (*j*) *Fenton v. Emblers*, 3 Burr. 1278; *Ridley v. Ridley*, 34 L. J. C. 462.
- (*k*) *Wells v. Horton*, 4 Bing. 40.
- (*l*) *Gilbert v. Sykes*, 16 East, 150, 154.
- (*m*) *Souch v. Strawbridge*, 2 C. B. 808.

formed within the year on one side, though they cannot be performed within the year on the other side, are not within the statute; thus, a contract for the sale of goods to be delivered in six months, and to be paid for in eighteen months, would not be within the statute (*a*). A contract for the sale and assignment of a patent to be paid for by payments at periods extending beyond a year, is not within the statute, because it is capable of being performed by the seller within the year (*b*). So, a contract between a landlord and tenant for the landlord to lay out £50 in improvement of the premises, no time being given for so doing, and the tenant to pay £5 a year increased rent during the remainder of the term, was held not within the statute (*c*).

**Contract which may be put an end to within the year.**—A contract which cannot be performed within the year is not taken out of the operation of the statute by reason that it may be defeated, or put an end to, within the year (*d*). Thus, a contract for the hire of a carriage from a coachmaker for five years for an annual payment, but which by the custom of the trade is determinable at any time within that period on payment of a year's hire, is within the statute (*e*). A contract of service determinable by three months' notice before a certain date, otherwise to continue for another twelve months, was held within the statute (*f*).

**Contract for the sale of goods of the value of £10.**—The contracts affected by the 17th section are contracts "for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards." Lord Tenterden's Act, 4 Geo. IV. c. 14, s. 7, after reciting this section of the statute, and that it had been held that it did not extend to certain executory contracts for the sale of goods which nevertheless were within the mischief thereby intended to be remedied, and that it was expedient to extend to such executory contracts, enacted "that the said enactment shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may

(*a*) Per Abbott, J., *Bracegirdle v. Heald*, 1 B. & Ald. 722, 727; per Parke, J., *Donellan v. Read*, 3 B. & Ad. 899, 903.

(*b*) *Cherry v. Heming*, 4 Ex. 631; *Smith v. Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143.

(*c*) *Donellan v. Read*, 3 B. & Ad. 899;

and see *Hoby v. Roebuck*, 7 Taunt. 157.

(*d*) Per Alderson, B., *Roberts v. Tucker*, 3 Ex. 632, 643.

(*e*) *Birch v. Earl of Liverpool*, 9 B. & C. 392.

(*f*) *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. Ex. 267.

be requisite for the making or completing thereof, or rendering the same fit for delivery" (*a*).

The 7th section of Lord Tenterden's Act and the 17th section of the Statute of Frauds are to be read and construed together (*b*); and one effect of the more recent enactment is to substitute the words "value of ten pounds" for the words "price of ten pounds" in the 17th section of the Statute of Frauds (*c*).

**Shares in companies.**—Shares in a joint stock banking company are not "goods, wares, or merchandises," within the section, being mere *choses in action* and incapable of delivery (*d*). A contract for the sale of railway shares, or railway scrip, is not within the section (*e*); so, a contract for the sale of foreign stock (*f*).

**Emblements Produce of land.**—The sale of emblements, or the annual growing crops sown by the tenant of land (which is not considered to be a contract within the 4th section as concerning an interest in the land), is held to be a sale of goods within the 17th section (*g*). The sale of the produce of land, to be taken as goods, though it is not severed from the land at the time of sale, is held not to be a contract concerning an interest in the land within the 4th section of the statute, but a contract relating to the sale of goods within this section (*h*); as a sale of timber at a certain price per foot, being the produce of certain trees then growing, when they should be cut down (*i*); so, a sale of a crop of seed to be sown and produced on certain land at so much per bushel (*j*).

**Fixtures.**—The right to remove fixtures does not come within the description of goods, wares, and merchandises, within this section, nor is it an interest in land within the fourth (*k*).

**Contracts for work and labor in making goods.**—Contracts for work and labor, though expended in making goods for the employer, are not contracts for the sale of goods within the statute. Thus, a contract with a person to make an article with the materials of the employer is a contract for work and labor, and not within the statute

(*a*) As to contracts of this kind before Lord Tenterden's Act see *Towers v. Osborne*, 1 Str. 506; *Mucklow v. Mangles*, 1 Taunt. 318; *Buxton v. Bedal*, 3 East, 303, seeming to hold them not within the statute; and *Cooper v. Elston*, 7 T. R. 14; *Wilks v. Atkinson*, 6 Taunt. 11; *Garbutt v. Watson*, 5 B. & Ald. 613; *Smith v. Surman*, 9 B. & C. 561, holding the contrary.

(*b*) *Scot v. Eastern Counties Ry. Co.*, 12 M. & W. 33, 38.

(*c*) See *Harman v. Reeve*, 18 C. B. 587; 25 L. J. C. P. 257.

(*d*) *Humble v. Mitchell*, 11 A. & E. 205.

(*e*) *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, 3 C. B. 284; *Knight v. Barber*, 16 M. & W. 66.

(*f*) *Heseltine v. Siggers*, 1 Ex. 856.

(*g*) *Evans v. Roberts*, 5 B. & C. 829; and see *ante*, p. 50.

(*h*) See *ante*, p. 51; *Smith v. Surman*, 9 B. & C. 561.

(*i*) *Smith v. Surman*, *supra*.

(*j*) *Watts v. Friend*, 10 B. & C. 446.

(*k*) See *ante*, p. 50; *Hallen v. Runder*, 1 C. M. & R. 266; and see *Horsfall v. Hey*, 2 Ex. 778.



(a). A contract with a person to work up his own materials in making an article, and to deliver it, may be a contract for work and labor and the materials incident to the employment, or a contract for the sale of goods, according to the circumstances (b); thus, a contract with an attorney to prepare a deed (c), a contract for contriving a machine for a certain purpose (d), a contract with a printer to print a book (e), are contracts for work and labor and materials, and not for the sale of goods, and are not within the statute. A contract for the manufacture of a machine (f), a contract with a tailor or shoemaker for the making of articles of their trade (g), a contract with a miller for a quantity of flour which he had to grind (h), a contract to make a set of artificial teeth to fit the mouth of the purchaser (i), a contract with an artist for a work of art (j), are not contracts for work and labor, but for the sale of goods when completed.

A contract for the sale of goods at a certain price, including the carriage and delivery of them at a certain place, is within the statute (k). Where a carrier was employed by a purchaser of goods to buy them for him, and to carry and deliver them, the contract was held not to be within the statute (l).

**Auction.**—A sale of goods by auction is within the statute (m).

**Value of the goods sold.**—The statute applies only to contracts for the sale of goods of the value of ten pounds sterling and upwards (n). If one contract is made for the sale of several articles, the value of which collectively is above ten pounds; though the value of each article separately may be less than ten pounds, the contract is within the statute (o).

**Sales of several articles.**—A purchase of various articles in a shop on one occasion at separate prices was held to be one contract, and, the articles together being above the value of ten pounds, within the statute (p). At a sale by auction each lot sold is a distinct contract, and if the same person buys several lots, each of less value than ten pounds, his contracts are not within the statute, though collectively

(a) Per Bayley, J., *Atkinson v. Bell*, 8 B. & C. 277, 283.

(b) *Ib.* and see *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252.

(c) See per Erle, J., *Grafton v. Armitage*, 2 C. B. 336, 339; per Blackburn, J., *Lee v. Griffin*, 1 B. & S. 272, 277.

(d) *Grafton v. Armitage*, 2 C. B. 336.

(e) *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237.

(f) *Atkinson v. Bell*, 8 B. & C. 277; see *Grafton v. Armitage*, *supra*.

(g) Per Coltman, J., *Grafton v. Armitage*, 2 C. B. 336, 341.

(h) *Garbutt v. Watson*, 5 B. & Ald. 613; and see *Wilks v. Atkinson*, 6 Taunt.

11; *Rondeau v. Wyatt*, 2 H. Bl. 63, 67.

(i) *Lee v. Griffin*, 1 B. & S. 272, 30 L. J. Q. B. 252.

(j) *Lee v. Griffin*, *supra*; but see per Pollock, C. B., *Clay v. Yates*, 1 H. & N. 73, 78; 25 L. J. Ex. 237, 239.

(k) *Astey v. Emery*, 4 M. & S. 262.

(l) *Cobbold v. Caston*, 1 Bing. 399.

(m) *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 B. & C. 945; overruling *Simon v. Motivos*, 1 W. Bl. 599. See *ante*, p. 49.

(n) See *ante*, p. 54.

(o) *Baldev v. Parker*, 2 B. & C. 37.

(p) *Ib.*; and see *post*, p. 72.

the value of the lots may be above ten pounds (*a*). The parties may subsequently treat the several sales as one entire contract by entering them altogether as one contract in a written memorandum (*b*). Whether a sale of several articles forms one contract or several seems, in general, to be a question of fact for the decision of the jury (*c*).

## § 2. FORMS AND CONDITIONS REQUIRED BY THE STATUTE OF FRAUDS.\*

Memorandum in Writing under ss.	Signature by Agent .....	64
4 and 17 .....	Acceptance and Receipt of Goods	66
When it may be made.....	under s. 17 .....	66
Contents.....	Earnest or Part Payment.....	72
Signature by Party charged.....		62

**Forms and conditions required by the statute.** The fourth section enacts “that no action shall be brought whereby to charge” any person upon any of the contracts of the kinds therein described, “unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

The seventeenth section enacts “that no contract” of the kind therein described “shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

It is proposed to treat first of the requirements of the statute respecting the note or memorandum in writing common to both sections, and then to treat in order of the other modes of exception provided in the seventeenth section, namely, the acceptance and receipt of part of the goods sold, and the giving of something in earnest or in part payment.

**Memorandum in writing.**—The statute does not require that the contracts to which it relates should be originally made in writing. If the parties have originally made their contract in writing, that writ-

(a) *Emmerson v. Heelis*, 2 Taunt. 38; and see *Biggs v. Wisking*, 14 C. B. 195.  
*Roots v. Lord Dormer*, 4 B. & Ad. 77; (c) See *Bailey v. Sweeting*, 9 C. B. N.  
*James v. Chapman*, 1 Stark. 427. S. 843.  
 (b) *Franklyn v. Lamond*, 4 C. B. 637;

\* Ch. I. Sect. V, § 2, Leake.

ing alone contains the contract by virtue of their agreement; and it also, if signed, satisfies the requirements of the statute. If they have not made their contract in writing, the plaintiff, seeking to charge the defendant with it, must resort to written documents signed by him, as letters, memoranda, etc., containing the terms of their contract, in order to satisfy the requirements of the statute (*a*).

**What kind of writing sufficient.**—A letter, the contents of which ascertain and identify the agreement, will serve this purpose; so, a letter referring to another document containing the terms of the contract (*b*); an invoice or bill of parcels signed by the party to be charged (*c*); a memorandum of the contract entered by one of the parties in his own book kept in his own possession (*d*); an order book of a tradesman containing a list of articles ordered and signed by the purchaser (*e*).

Brokers' bought and sold notes are sufficient, unless they disagree in their terms (*f*); one of such notes is sufficient though the other is not produced, and it will be presumed that they agree (*g*); the entry of the contract in the brokers' own book is sufficient to charge the parties in the absence of the bought and sold notes (*h*).

An affidavit sworn to and signed by the defendant in another cause was held to be a sufficient memorandum of the terms of an agreement mentioned in it which had been previously made by parol (*i*).

So, a letter written by one of the parties to his own solicitor or agent, or a correspondence between the party and his agent containing the terms of the contract (*j*).

**Memorandum contained in several writings.**—The note or memorandum may consist of several documents, if they are sufficiently connected together by internal reference. A letter written after a sale by auction, acknowledging the sale and referring to the conditions of sale, was held to incorporate those conditions with the letter, so as to constitute a memorandum of the contract sufficient to charge the

(*a*) *Sievwright v. Archibald*, 17 Q. B. 103, 107, 114; *Roberts v. Tucker*, 3 Ex. 632, 641.

(*b*) *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Dobell v. Hutchinson*, 3 A. & E. 355; *Ridgway v. Wharton*, 6 H. L. C. 238.

(*c*) *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337; *Wilkinson v. Evans*, L. Rep. 1 C. P. 407; 35 L. J. C. P. 224.

(*d*) *Johnson v. Dodgson*, 2 M. & W. 653.

(*e*) *Sarl v. Bourdillon*, 1 C. B. N. S. 188; 26 L. J. C. P. 78.

(*f*) *Goom v. Aftalo*, 6 B. & C. 117; *Sievwright v. Archibald*, 17 Q. B. 103.

(*g*) *Parton v. Crofts*, 16 C. B. N. S. 11; 33 L. J. C. P. 189.

(*h*) See per Parke, B., *Thornton v. Charles*, 9 M. & W. 802, 807; *Pitts v. Beckett*, 13 M. & W. 743, 746; per Lord Campbell, C. J., *Sievwright v. Archibald*, 17 Q. B. 103, 124.

(*i*) *Barkworth v. Young*, 4 Drew. 1; 26 L. J. C. 153; and see *Rondeau v. Wyatt*, 2 H. Bl. 63.

(*j*) *Gibson v. Holland*, 1 H. & R. 1; 35 L. J. C. P. 5; L. R. 1 C. P. 1; and see *Welford v. Beazely*, 3 Atk. 503; *Rose v. Cunninghame*, 11 Ves. 550; *Barkworth v. Young*, 4 Drew. 1, 13.

party signing it, though he did not sign the conditions separately (a). A letter referring to a memorandum of agreement, and supplying certain particulars in which the memorandum was deficient, was held jointly with the memorandum to satisfy the statute (b). A correspondence between the parties by letters sufficiently connected together by their contents, and containing the terms of the contract, constitutes a sufficient note in writing (c).

But several documents cannot be connected by external evidence for the purpose of making a note or memorandum to satisfy the statute (d). A party signed his name in a book as a subscriber to a work to be published according to a printed prospectus, but the signed book contained no reference to the prospectus; it was held that there was no signed memorandum of the contract (e). A sale by auction took place according to printed conditions of sale, and a memorandum in writing was made of the sale of a lot without including or referring to the conditions; it was held that they could not be connected by external evidence (f).

**When the memorandum may be made.**—It is sufficient if there is a memorandum of the contract at the time of action brought, though none existed at the time of making the contract; but a memorandum made after the commencement of an action upon the contract is not sufficient to maintain the action (g). Where an agreement was made in consideration of marriage within the statute, and the marriage took place, a memorandum made after the marriage was held sufficient (h). An agreement or proposal of an agreement in writing, signed by the party charged before it was accepted by the other party, is sufficient (i).

**Contents of the memorandum.**—The note or memorandum under both the 4th and the 17th sections, must contain the terms of a complete contract between the parties; and if any essential term is wanting, the memorandum is insufficient (j); for the statute operates upon the evidence of contracts only, and does not render them enforceable in any case in which at common law they would not have been so (k). Hence the writing must contain the names

(a) *Dobell v. Hutchinson*, 3 A. & E. 355; and see *Phillimore v. Barry*, 1 Camp. 513; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J. C. 46.

(b) *Allen v. Bennet*, 3 Taunt. 169; *Brettel v. Williams*, 4 Ex. 623; *Warner v. Willington*, 3 Drew. 523; 25 L. J. C. 662.

(c) *Allen v. Bennet*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bing. 9.

(d) See *Ridgway v. Wharton*, 3 De G. M. & G. 677, 694.

(e) *Boydell v. Drummond*, 11 East, 142.

(f) *Kenworthy v. Schofield*, 2 B. & C. 945.

(g) *Bill v. Bament*, 9 M. & W. 36; and see *Fricke v. Thomlinson*, 1 M. & G. 772, 774.

(h) *Barkworth v. Young*, 4 Drewry, 1; 26 L. J. C. 153, 157.

(i) *Reuss v. Picksley*, L. R. 1 Ex. 342.

(j) *Wain v. Warlters*, 5 East, 10; 2 Smith's L. C. 5th ed. 208; per Bayley, J., *Kenworthy v. Schofield*, 2 B. & C. 945, 947.

(k) *Rann v. Hughes*, 7 Bro. P. C. 550, 7 T. R. 350, (a).

of the two contracting parties, the matter of the contract, comprising the consideration and the promise, and must import an agreement of the parties to the same terms (*a*).

**The memorandum must contain the names of both parties.**—A memorandum of a contract of sale in which the name of the buyer or of the seller does not appear is not sufficient, nor is the other party chargeable thereby, although it is signed by him (*b*). A memorandum as follows :—"A. agrees to buy the marble purchased by B., etc." was held not sufficiently to designate the name of B. as the seller (*c*). So, a written guarantee signed by the defendant, but in which the name of the party to whom it was made did not appear, was held insufficient (*d*). A memorandum of agreement for a lease signed by the lessee, but in which the name of the lessor did not appear, was held to be insufficient; but it was also held that the deficiency was supplied by a letter from the lessee referring to the memorandum and mentioning the name of the lessor (*e*). The defendant purchased goods of the plaintiff and wrote his name in the order book of the plaintiff before the list of articles ordered, and the name of the plaintiff appeared on the fly-leaf of the book; it was held that there was a sufficient memorandum containing the names of both the parties to charge the defendant (*f*).

**The memorandum must contain the consideration and the promise.**—A written document which does not show either in express terms, or by necessary implication, a valid consideration for the promise is not a sufficient memorandum of a contract (*g*). Thus, a written document in which the defendant agreed to remain with the plaintiff for two years to learn a business was held insufficient, for not stating an engagement by the plaintiff to teach, or any other consideration (*h*). A contract of sale, not mentioning the price, would import a sale at a reasonable price, and would be a sufficient memorandum, provided no other price had in fact been agreed upon (*i*). So, an order for goods "on moderate terms" is a sufficient memorandum of a contract to that effect (*f*). An agreement for a lease in which

(*a*) See *Laythoarp v. Bryant*, 2 Bing. N. C. 735, 742.

(*b*) *Champion v. Plummer*, 1 B. & P. N. R. 252; *Wheeler v. Collier, M. & M.* 123; *Graham v. Musson*, 5 Bing. N. C. 603.

(*c*) *Vandenbergh v. Spooner*, L. Rep. 1 Ex. 316.

(*d*) *Williams v. Lake*, 2 E. & E. 349; 29 L. J. Q. B. 1.

(*e*) *Warner v. Willington*, 3 Drew. 523; 25 L. J. C. 662; and see *Allen v. Bennett*, 3 Taunt. 169.

(*f*) *Sarl v. Bourdillon*, 1 C. B. N. S. 188; 26 L. J. C. P. 78.

(*g*) *Wain v. Warlters*, 5 East, 10; 2 Smith's L. C. 5th ed. 208; *Jenkins v. Reynolds*, 3 B. & B. 14; *Hawes v. Armstrong*, 1 Bing. N. C. 761, 765.

(*h*) *Lees v. Whitcomb*, 5 Bing. 34; and see *Sykes v. Dixon*, 9 A. & E. 693.

(*i*) *Elmore v. Kingscote*, 5 B. & C. 583; *Acebal v. Levy*, 10 Bing. 376, 383; *Hoadly v. M' Laine*, 10 Bing. 482.

(*j*) *Ashcroft v. Morrin*, 4 M. & G. 450.

the term is not mentioned would not be sufficient, unless it could be presumed to be a letting from year to year (*a*).

**The Consideration of a guarantee not required to appear in writing.**—Guarantees, or “promises to answer for the debt, default, or miscarriages of another person,” have been recently excepted from the rule requiring that the consideration for the promise should appear in the memorandum (*b*). By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, it is enacted that “no special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” Under this section the consideration of the contract may be proved by parol evidence; but the promise must still be complete in the writing, and the parol evidence admissible to prove the consideration cannot be used to explain the written promise (*c*). A written guarantee is held not to be exempt from an agreement stamp merely by reason of the consideration being proved by parol evidence, instead of being included in the writing (*d*).

**The memorandum must show an agreement of both parties to the same terms.**—The writing must show an agreement of both the parties to the same terms. A letter of the defendant admitted giving an order for goods as entered in writing by the seller, but asserted an additional term as to the time of delivery; it was held not to be a sufficient memorandum of a contract (*e*). So, the plaintiff having sold certain timber to the defendant wrote him a letter specifying the terms of the sale and requesting him to pay for it, to which the defendant replied by letter asserting that the sale was conditional upon the quality of the timber; it was held that there was not a sufficient memorandum of a contract (*f*). The plaintiff charged the defendant with a sale of specific barrels of flour and sent him an invoice containing the description and price, and the defendant answered by letter that he bought the flour by sample with which the flour sent

(*a*) *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Fitzmaurice v. Bayley*, 8 E. & B. 664; 27 L. J. Q. B. 143; and see *Richardson v. Langridge*, 4 Taunt. 128.

(*b*) See the cases before that statute; *Wain v. Warlters*, 5 East, 10; *Morley v. Boothby*, 3 Bing. 107; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Key-*

*nolds*, 3 B. & B. 14; *Price v. Richardson*, 15 M. & W. 539.

(*c*) *Holmes v. Mitchell*, 7 C. B. N. S. 361; 28 L. J. C. P. 301.

(*d*) *Glover v. Hackett*, 2 H. & N. 487; 26 L. J. Ex. 416.

(*e*) *Cooper v. Smith*, 15 East, 103; and see *Richards v. Porter*, 6 B. & C. 437.

(*f*) *Smith v. Surman*, 9 B. & C. 561.

did not agree; there was held to be no sufficient memorandum (*a*). Where a contract is made through brokers' bought and sold notes, and the notes materially differ from each other, they are not a sufficient memorandum of a contract (*b*); but where a broker's note sent to one party, though varying from that sent to the other, agrees with the contract actually made, it seems that it would be a sufficient memorandum of that contract (*c*); and where one of the notes only is produced as evidence of the contract, it will be assumed that it agrees with the note not produced, and is sufficient to satisfy the statute (*d*).

**Memorandum denying liability.**—If the writing admits the contract charged, it is immaterial that it also repudiates liability under it for a reason not affecting the admission of the contract. The plaintiff wrote to the defendant a letter referring to the terms of a contract made with him for the sale and delivery of certain goods, and complaining of the quality of the goods already delivered; the defendant answered by a letter not disputing any of the terms mentioned, but asserting that he had performed the contract as far as it had gone and was ready to perform the remainder; the letters were held to be a sufficient memorandum of the contract to charge the defendant (*e*). A letter from the defendant referring to a purchase of goods from the plaintiff, but refusing to accept or pay for them on the ground that the carrier had damaged them in the transit, was held sufficient to satisfy the statute (*f*). The defendant wrote on the back of the invoice sent with the goods to the effect that the goods had arrived, but that they were badly crushed, and therefore he returned them, and signed his name; it was held that there was a sufficient memorandum (*g*). A letter from the defendant referring to a written memorandum of agreement previously made, and begging to withdraw it, would, it seems, be sufficient (*h*). An answer by a defendant to a bill in Chancery admitting an agreement charged, but pleading the Statute of Frauds, was held insufficient to charge the defendant in an action upon the same agreement (*i*).

**The memorandum must contain the contract made.**—The writing must not only contain a complete contract, but must contain the contract in fact made; and a defendant charged with a contract contained in a writing signed by him may show by extrinsic evidence that such

(*a*) *Archer v. Baynes*, 5 Ex. 625.

(*b*) *Grant v. Fletcher*, 5 B. & C. 436;  
*Gregson v. Ruck*, 4 Q. B. 737; *Sieve-  
wright v. Archibald*, 17 Q. B. 103; *ante*,  
P. 8.

(*c*) *Per Erle, J., Sievewright v. Archi-  
bald*, *supra*.

(*d*) *Parton v. Crofts*, 16 C. B. N. S.  
11; 33 L. J. C. P. 189.

(*e*) *Jackson v. Lowe*, 1 Bing. 9.

(*f*) *Bailey v. Sweeting*, 9 C. B. N. S.  
843; 30 L. J. C. P. 150.

(*g*) *Wilkinson v. Evans*, L. Rep. 1 C.  
P. 407; 35 L. J. C. P. 224.

(*h*) *Warner v. Willington*, 3 Drew. 523;  
25 L. J. C. 662.

(*i*) *Rondeau v. Wyatt*, 2 H. Bl. 63.

contract is not the contract which he in fact made. Thus, a letter written by the defendant admitting the purchase of a horse from the plaintiff, but not mentioning any price, was held to be an insufficient memorandum of the contract actually made to buy the horse at a price agreed upon (*a*). But where a contract was made for the sale of goods without fixing any price, and which therefore amounted in law to a contract of sale at their reasonable value, a memorandum in writing of the contract not mentioning any price was held sufficient (*b*). A letter containing an agreement to let premises, but not stating the duration of the term, was held an insufficient memorandum of a contract to let for a certain term (*c*); it might be a sufficient memorandum of a letting from year to year (*d*). A memorandum of the sale of an article described as "a candlestick complete" was held a sufficient memorandum of the contract to satisfy the statute, though it was also agreed as part of the contract that certain additions should be made to the article to render it complete, which were not mentioned in the memorandum (*e*).

A contract was made for the sale by the plaintiff to the defendant of certain goods at the then shipping price, and the defendant subsequently wrote a letter to the plaintiff containing a complete acknowledgment of the contract except that it was silent as to the price; it was held that the defendant could not be charged upon this letter with the contract as made, because the letter imported a sale at a reasonable price and not at the shipping price; also that the defendant could not be charged upon the letter with a contract of sale at a reasonable price, because he might show by parol evidence that the contract in fact made was for a sale at the shipping price (*f*).

At a sale by auction upon certain conditions a note of the contract was made by writing the price and the purchaser's name in the catalogue opposite the lot purchased by him; the conditions were not annexed to the catalogue or referred to therein; it was held that the note was not sufficient as it did not contain the contract actually made (*g*). So, where a sale of goods was made with a stipulation as to their condition, the broker's sale-note omitting the condition was held not to be a sufficient memorandum of the contract (*h*).

**The memorandum must be signed by the party charged.**—The name of the party inserted in any part of the writing, in a manner

(*a*) *Elmore v. Kingscote*, 5 B. & C. 583.

(*b*) *Hoadley v. M'Laine*, 10 Bing. 482; *Ashcroft v. Morrin*, 4 M. & G. 450; and see *ante*, p. 59.

(*c*) *Fitzmaurice v. Bayley*, 8 E. & B. 664; 27 L. J. Q. B. 143.

(*d*) *Ib.*, and see *Richardson v. Langridge*, 4 Taunt. 128.

(*e*) *Sarl v. Bourdillon*, 1 C. B. N. S. 188; 26 L. J. C. P. 78.

(*f*) *Acebal v. Levy*, 10 Bing. 376.

(*g*) *Kenworthy v. Schofield*, 2 B. & C. 945.

(*h*) *Pitts v. Beckett*, 13 M. & W. 743.



to authenticate it, is a sufficient signing to satisfy the statute (a). Thus, the forms "Mr. A. presents his compliments, etc." (b); "Mr. A. has agreed with, etc." (c), have been held sufficient. The subscription to a letter "your affectionate mother," without signature of the name, was held not sufficient (d). A memorandum of a contract of sale written by the defendant in a book of his own in the form, "Sold J. D." the defendant's name etc., was held to be sufficiently signed by him, though his name did not appear elsewhere in the memorandum (e); so, a bill of parcels delivered by the defendant to a buyer of goods, in which the defendant's name was printed at the commencement as the seller (f).

Articles of agreement were formally drawn up, containing the names of the several contracting parties in the commencement, and concluding "as witness our hands," but no signatures were appended; it was held not sufficiently signed within the statute, because the form of the instrument showed that it was intended that the names of the parties should be subscribed, and that the insertion of the names in the body of the instrument should not operate by way of signature (g). The name of the party occurring in a note of the agreement, drawn up as instructions to an attorney to prepare a lease, was held not to be a signature within the statute (h).

The defendant previously to the marriage of the plaintiff with her daughter had verbally agreed to give her a marriage portion of £1000, and articles were executed settling the £1000; the defendant was not a party to the articles, but signed them as a witness, knowing their contents; the signature was held sufficient to satisfy the statute (i).

The initials of the name of a party used for the purpose of authenticating the memorandum are a sufficient signing; as where an auctioneer wrote in the catalogue the initials of the name of a purchaser against the lot purchased by him (j). Signing with a mark is sufficient (k). The signature may be printed (l). A signature in pencil of a memorandum written in ink would be sufficient, unless it appeared that the pencil marks were made for the purpose of deliberating upon

(a) *Johnson v. Dodgson*, 2 M. & W. 653, 659; *Hubert v. Treherne*, 3 M. & G. 743; and see *Lobb v. Stanley*, 5 Q. B. 574; *Stokes v. Moore*, 1 Cox, 219.

(b) *Ogilvie v. Foljambe*, 3 Mer. 53.

(c) *Proper v. Parker*, 1 R. & M. 625; *Bleakley v. Smith*, 11 Sim. 150.

(d) *Selby v. Selby*, 3 Mer. 2.

(e) *Johnson v. Dodgson*, 2 M. & W. 653; and see *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337.

(f) *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286.

(g) *Hubert v. Treherne*, 3 M. & G. 743.

(h) *Stokes v. Moore*, 1 Cox, 219.

(i) *Welford v. Beazely*, 3 Atk. 503; cited by *Kindersley, V.C., Barkworth v. Young*, 4 Drew. 1, 14; 26 L. J. C. 153, 158; and see per Lord Eldon, *Coles v. Trecothick*, 9 Ves. 234, 250.

(j) *Phillimore v. Barry*, 1 Camp. 513.

(k) *Schneider v. Norris*, 2 M. & S. 286, 289; *Baker v. Dening*, 8 A. & E. 94; and see *Harrison v. Elvin*, 3 Q. B. 117.

(l) *Schneider v. Norris*, 2 M. & S. 286.

the points marked, and not of finally authenticating the document (a)

A deed is valid if duly sealed and delivered, and does not require to be signed by the party to be charged under the Statute of Frauds, although it relates to a matter within the statute (b).

**The memorandum need not be signed by the party charging the contract.**—It is sufficient under the statute that the note or memorandum of the agreement in writing be signed by the party to be charged therewith, and it is not necessary that the agreement or consent of the other party to the writing should be proved by writing or signature; hence a plaintiff may be able to charge the defendant upon a contract, upon which the defendant would fail to charge the plaintiff in an action for want of a note or memorandum in writing signed by him (c). But if a party to a contract signs a document in a manner sufficient to bind himself, but upon the condition that he is not to be bound unless the other party also signs it, there is no valid contract until it is signed by both parties.

Specific performance will be decreed in equity in favor of a party who has not signed a written memorandum of the contract against a party who has signed; but in equity the former by filing his bill submits to the jurisdiction of the Court, and is compelled to perform the contract on his part in order to entitle him to specific performance from the other (d). And in an action at law, it is necessary for the plaintiff to show the performance on his part of all such parts of the contract as constitute conditions precedent to the liability of the defendant (e).

**Signature by agent.**—The memorandum may be signed by an agent of the party thereunto by him lawfully authorized. The authority of an agent to sign for his principal under the 4th and 17th sections of the statute may be conferred without writing (f).

A broker employed by both buyer and seller is the agent of both parties to sign a contract made within the scope of his employment (g). The defendant, having bought goods from the agent of the seller,

(a) *Lucas v. James*, 7 Hare, 410, 419.

(b) See *ante*, p. 26.

(c) *Egerton v. Mathews*, 6 East, 307; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Sweet v. Lee*, 3 M. & G. 452, 462 (a); *Smith v. Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143; *Warner v. Willington*, 3 Drew. 523; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122; *Reuss v. Picksley*, L. R. 1 Ex. 342.

(d) *Martin v. Mitchell*, 2 J. & W. 413, 426; *Boys v. Ayerst*, 6 Madd. 316, 324;

and see *Warner v. Willington*, 3 Drew. 523, 532.

(e) See *post*, Chap. XII.

(f) *Emmerson v. Heelis*, 2 Taunt. 38, 46; per Tindal, C. J., *Acebal v. Levy*, 10 Bing. 376, 378. The first and third sections of the statute, relating to the creation of estates and interests in land, expressly require the authority of the agent to sign the writing within those sections to be conferred in writing.

(g) *Goom v. Aflalo*, 6 B. & C. 117; *Pitts v. Beckett*, 13 M. & W. 743; *Sieve-wright v. Archibald*, 7 Q. B. 103.

requested him to write a note of the contract in his, the buyer's book, which the agent did, and signed it with his own name; it was held that there was no evidence that the defendant authorized the agent to sign for him, and that he was not bound by the signature (*a*). Upon a sale of goods by the factor of the plaintiff to the defendant, the factor drew up a note of the sale in which he entered the name of the defendant as purchaser, and delivered it to the defendant, who requested an alteration to be made in it, which was done, and then accepted it; it was held that there was evidence of an authority in the factor to write the defendant's name (*b*).

An auctioneer is presumptively the agent for both the seller and the purchaser for the purpose of signing a memorandum of a sale by auction (*c*); but only during the auction, so that the authority was held not to extend to signing a contract for some unsold lots sold by the auctioneer to the defendant by private contract after the auction was over (*d*). An auctioneer's clerk who is employed to write down the names of the purchasers is considered as authorized by them to do so (*e*). The owner of goods, put up to auction, having made a private agreement with the bidder as to the terms on which he might pay the purchase-money, it was held that the auctioneer was not authorized by the bidder to bind him to the published conditions of sale as to the mode of payment (*f*).

A solicitor employed to write down the terms of an agreement, as instructions for preparing a formal document, was held not to be thereby constituted the agent of the parties to bind them by his signature of their names in the document (*g*).

One of the contracting parties cannot act as agent of the other contracting party to sign the contract for him (*h*). So, where the auctioneer himself sues as principal party to the contract for the price of the goods sold, which in general he may do, he cannot avail himself of his authority, as auctioneer, to sign the purchaser's name to the contract of sale, in order to charge the purchaser on the contract with himself (*i*). But the auctioneer's clerk, employed at the auction in writing down the purchasers' names, may be agent for the pur-

(*a*) *Graham v. Musson*, 5 Bing. N. C. 603.

(*b*) *Durrell v. Evans*, 6 H. & N. 660; 1 H. & C. 174; 30 L. J. Ex. 254; 31 *ib.* 337.

(*c*) *Walker v. Constable*, 1 B. & P. 306; *Kenworthy v. Schofield*, 2 B. & C. 945, 947; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Hinde v. Whitehouse*, 7 East, 558.

(*d*) *Mews v. Carr*, 1 H. & N. 484; 26 L. J. Ex. 39.

(*e*) *Bird v. Boulter*, 4 B. & Ad. 443.

(*f*) *Bartlett v. Purnell*, 4 A. & E. 792.

(*g*) *Earl of Glengal v. Barnard*, 1 Keen, 769.

(*h*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333, 335. "This is very doubtful law." Blackburn's Contract of Sale, p. 76.

(*i*) *Farebrother v. Simmons*, 5 B. & Ald. 333.

chaser so as to charge him by his signature in an action brought upon the contract by the auctioneer (*a*).

Where an agent professes to sign for a principal, but without authority, a subsequent ratification of the signature by the principal is equivalent to a previous authority (*b*). Upon a sale by auction a memorandum of the contract was drawn up and signed by the purchaser, and also by the auctioneer's clerk expressly "as witness;" it was held that this signature by the clerk, excluding the character of agent was not sufficient to charge the vendor, and could not be supported by a subsequent recognition (*c*).

If the agent is duly authorized, the signature of his own name will bind the principal (*d*).

The authority of the agent to sign may be countermanded at any time before the signing is completed. The defendant having authorized a broker to sell goods for him and the broker having sold them to the plaintiff, before the sale note was made out the defendant countermanded the authority of the broker; it was held that the contract could not be enforced (*e*). At a sale by auction, after a lot has been knocked down to a purchaser he may countermand the auctioneer's authority to sign the contract for him (*f*).

**Acceptance and receipt of goods under 17th section.**—The 17th section excepts from its operation the cases in which "the buyer shall accept part of the goods so sold and actually receive the same," so that upon an acceptance and receipt of goods being established, the contract of sale under which they were received is not affected by the statute. The defendant having accepted and received certain goods above the value of £10, it was held that the plaintiff might prove by parol evidence a contract of sale to the defendant for ready money; although the defendant asserted that he accepted and held the goods by agreement as security for a previous debt (*g*). The acceptance and receipt of the goods sold, like the memorandum in writing, must take place before an action is brought, in order to obviate the effect of the statute upon the contract in that action (*h*).

In order to constitute an acceptance and receipt within the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an

(*a*) *Bird v. Boulter*, 4 B. & Ad. 443.  
 (*b*) *Maclean v. Dunn*, 4 Bing. 722;  
*Fitzmaurice v. Bayley*, 8 E. & B. 664;  
 26 L. J. Q. B. 115; 27 *ib.* 143.  
 (*c*) *Gosbell v. Archer*, 2 A. & E. 500.  
 (*d*) *White v. Proctor*, 4 Taunt. 209;  
*Kenworthy v. Schofield*, 2 B. & C. 945;  
 and see *Graham v. Musson*, 5 Bing. N.  
 C. 603.

(*e*) *Farmer v. Robinson*, 2 Camp. 339,  
 note; and see *Warwick v. Slade*, 3 Camp.  
 127.  
 (*f*) See *Jones v. Nanney*, 1 M'Clel. 25.  
 (*g*) *Tomkinson v. Staight*, 17 C. B.  
 897; 25 L. J. C. P. 85.  
 (*h*) *Bill v. Bament*, 9 M. & W. 36, 40;  
*ante*, p. 58.

actual acceptance by the latter, with an intention of taking to the possession as owner (*a*). Such delivery and acceptance are matters of fact to be found by the jury (*b*). At a sale of goods by auction upon the conditions that the buyer was to pay 30 *per cent.* of the price upon being declared the highest bidder, and the residue before the goods were removed, a lot was knocked down to the defendant and handed to him immediately without any payment, and the defendant shortly after returned it, alleging that he was mistaken in the price at which it was knocked down to him; it was held to be a question for the jury whether there had been a delivery by the seller and an acceptance by the buyer with an intent to transfer the right of possession (*c*). Upon a sale of goods, then being in the seller's warehouse, the buyer took away a portion, but immediately sent it back stating that the goods were of inferior quality; it was held that there was evidence for the jury of an acceptance and receipt within the statute (*d*).

**Acceptance of the goods.**—Upon a sale of unascertained goods by description and quantity it was formerly held that the statute intended such an acceptance as amounted to an acknowledgment by the buyer of a performance of the contract by the seller as to the goods delivered, and precluded him from afterwards objecting to the quantity and quality of the goods (*e*). But according to more recent decisions there may be an acceptance and receipt of goods by a buyer within the Statute of Frauds, although he has done nothing to preclude himself from objecting that they do not correspond with the contract (*f*). So, there may be an acceptance of the goods sufficient to satisfy the statute, though not sufficient to preclude the buyer from suing the seller for non-delivery (*g*); or to enable the seller to sue the buyer in an action for goods sold and delivered (*h*). Upon a sale of goods by sample the seller delivered the goods to a carrier named by the buyer, and the buyer resold the goods by the same sample and directed the carrier to convey them to the sub-purchaser, who rejected them as not according with the sample; it was held that there was sufficient evidence of an acceptance within the statute to admit parol evidence of the contract, though the buyer might still object that the goods delivered did not agree with the sample (*i*). So, where goods were deliv-

(*a*) *Phillips v. Bistolli*, 2 B. & C. 511; *Maberley v. Sheppard*, 10 Bing. 99, 102.

(*b*) *Id.*; *Edan v. Dudfield*, 1 Q. B. 302, 307; *Lillywhite v. Devereux*, 15 M. & W. 285, 291.

(*c*) *Phillips v. Bistolli*, 2 B. & C. 511.

(*d*) *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159.

(*e*) *Hanson v. Armitage*, 5 B. & Ald. 557, 558; *Smith v. Surman*, 9 B. & C. 561, 577, (*a*).

(*f*) *Morton v. Tibbett*, 15 Q. B. 428; *Parker v. Wallis*, 5 E. & B. 21; per Crompton, J., *Currie v. Anderson*, 2 E. & E. 592, 600; 29 L. J. Q. B. 87, 90.

(*g*) *Anderson v. Scot*, 1 Camp. 235, note.

(*h*) Per Patteson, J., *Curtis v. Pugh*, 10 Q. B. 111, 114.

(*i*) *Morton v. Tibbett*, 15 Q. B. 428.

ered on board a ship to the order of the defendant who received the bill of lading and dealt with it as owner of the goods, it was held that there was evidence of an acceptance within the statute (*a*). The buyer under a contract for the sale of goods of a certain description having received the goods delivered into his warehouse, unpacked the whole and considering it inferior to the description repacked it and returned it; it was held that such dealing with the goods, not being with the intention of taking possession, did not alone constitute an acceptance (*b*).

The acceptance of the goods may be made while they remain in the possession of the seller and before the actual delivery and receipt, which however are also necessary to satisfy the statute (*c*). Thus, where the buyer selected the specific goods to be delivered under the contract, and they were afterwards delivered to a carrier appointed by the buyer to receive them, it was held that there was an acceptance within the statute before the delivery (*d*).

A carrier appointed by the buyer to receive the goods from the seller and carry them, or a warehouseman or wharfinger appointed by the buyer to receive the goods, is not in general authorized to accept them within the statute; so that upon a sale of unascertained goods a delivery by the seller to the carrier, or wharfinger, or warehouseman, appointed by the buyer does not alone, without any act of acceptance by the buyer, satisfy the statute (*e*). A delivery of such goods to a railway company to be forwarded to a station specified by the buyer, which are duly forwarded and lie at the orders of the buyer, does not alone satisfy the statute (*f*). The delivery and receipt of such goods on board a ship chartered by the buyer for the purpose of carrying them is not an acceptance by him (*g*); but the buyer may receive and so deal with the bill of lading as to be equivalent to an acceptance of the goods (*h*).

If the buyer retains the goods for an unreasonable time after delivery without communicating to the seller his intention to refuse them, it is evidence of his acceptance of the goods (*i*). Thus, where the goods were delivered at a warehouse by the order of the buyer,

(*a*) *Currie v. Anderson*, 2 E. & E. 592; 29 L. J. Q. B. 87; and see *Meredith v. Meigh*, 2 E. & B. 364.

(*b*) *Curtis v. Pugh*, 10 Q. B. 111.

(*c*) *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261.

(*d*) *Ib.*; and see *Saunders v. Topp*, 4 Ex. 390.

(*e*) *Hanson v. Armitage*, 5 B. & Ald. 557; *Johnson v. Dodgson*, 2 M. & W. 653; *Hunt v. Hecht*, 8 Ex. 814; *Meredith v. Meigh*, 2 E. & B. 364; overruling *Hart v. Sattley*, 3 Camp. 528; *Hart v. Bush*, E. B. & E. 494; 27 L. J. Q. B. 271.

(*f*) *Norman v. Phillips*, 14 M. & W. 277; *Smith v. Hudson*, 34 L. J. Q. B. 145; and see *Coombs v. Bristol and Exeter Ry. Co.*, 3 H. & N. 510; 27 L. J. Ex. 401; *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97.

(*g*) *Acebal v. Levy*, 10 Bing. 376.

(*h*) *Currie v. Anderson*, 2 E. & E. 592; 29 L. J. Q. B. 87; and see *Meredith v. Meigh*, 2 E. & B. 364.

(*i*) *Bushel v. Wheeler*, 15 Q. B. 442; *Norman v. Phillips*, 14 M. & W. 277.

who saw them there and told the warehouseman that he would not take them, but made no communication of his refusal to the seller until the end of five months, it was held that there was evidence proper for a jury to consider of an acceptance (a).

**Delivery and receipt of the goods.**—The receipt of the goods imports a delivery of possession to the buyer; there is no change of possession or receipt of the goods within the statute while the seller retains his lien for the price (b). The plaintiff sold goods to the defendant which were accepted by the defendant and removed to his warehouse, but by a term of the contract of sale they were not to be removed from thence until paid for; it was held that the seller retained no lien on the goods, but had merely the personal contract of the buyer not to remove them, and therefore the receipt was complete within the statute (c).

**Constructive delivery and receipt.**—There may be a constructive delivery and receipt of the goods without any actual change of possession, by a mere transfer of the right to which the possession is referred.

**Where the goods are in the possession of the buyer at the time of the sale.**—Where the possession is already in the buyer, the delivery may be effected by a transfer of the right of possession to the buyer, as owner. Goods of the plaintiff being in the hands of the defendant for the purpose of being sold, it was agreed between them that the defendant should buy them himself; he afterwards sold them to a third party; it was held that there was evidence within the statute of a receipt and acceptance of the goods by the defendant (d). The defendant being in the occupation of a furnished house as tenant to the plaintiff, it was agreed between them that the plaintiff should sell the furniture to the defendant at a valuation; after the valuation was made the defendant refused to complete the purchase, and gave the plaintiff notice to remove the furniture, but he continued tenant of the house, and continued to hold the furniture until he removed it to a broker's and gave notice to the plaintiff of the removal; the Court held that there was no evidence of acceptance by the defendant, but said "that if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such

(a) *Bushel v. Wheeler*, 15 Q. B. 442.

(b) *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald.

855; *Maberley v. Sheppard*, 10 Bing. 99. 101; *Bill v. Bament*, 9 M. & W. 36.

(c) *Dodsley v. Varley*, 12 A. & E. 632.

(d) *Edan v. Dudfield*, 1 Q. B. 302.

goods under a contract so as to take the case out of the operation of the Statute of Frauds, as for instance if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like" (α).

The plaintiff being in possession of goods of the defendant under a contract of hiring, it was agreed without writing that the plaintiff might purchase them if he pleased at the termination of the hiring, but was not to take them till the money was paid; at the expiration of the hiring the plaintiff tendered the price, but the defendant refused it and denied the validity of the bargain, whereupon the plaintiff claimed the goods and proceeded to take them as his own under the sale; it was held that there was no delivery and receipt within the statute, because the assumption of possession by the plaintiff was wrongful and without the consent of the defendant (β).

**Where the goods remain in the possession of the seller—**Where the goods remain in the actual possession of the seller, the delivery may take place by a transfer of the right of possession to the buyer, and by the seller consenting to hold them as his agent. The defendant purchased some horses of the plaintiff, and requested the plaintiff to keep them for him at livery, which the plaintiff acceded to and so kept them for him; it was held that there was a delivery and receipt sufficient to satisfy the statute (c). A complete bargain having been made for the sale of a horse, the seller, before delivering the horse, asked the buyer to lend him the horse for a journey, which the defendant assented to; it was held that there was a sufficient delivery and receipt, for after the sale the seller held possession of the horse as borrower from the owner and not as himself the owner (d). Upon a sale of a stack of hay standing on the seller's premises, the sale of part of it by the buyer to another and the taking away of that part by him was held to amount to a delivery and receipt (e). After a sale of a horse, then being in a stable in the possession of the seller, the buyer brought a person to see it and offered to sell it him, but he declined on the ground of an unsoundness which he discovered, whereupon the buyer refused to complete his purchase; it was held that there was some evidence to go to a jury of a delivery and receipt (f). The defendant bought a carriage in the shop of the plaintiff and requested the plaintiff to keep it for him, he making occasional use of it and returning it to the shop of the plaintiff; it was held that there was a sufficient delivery and receipt (g). The defendant ordered some

(α) *Lillywhite v. Devereux*, 15 M. & W. 285.

(β) *Taylor v. Wakefield*, 6 E. & B. 705.

(c) *Elmore v. Stone*, 1 Taunt. 458.

(d) *Marvin v. Wallace*, 6 E. & B. 726; 25 L. J. Q. B. 369.

(e) *Chaplin v. Rogers*, 1 East, 192.

(f) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(g) *Beaumont v. Brengeri*, 5 C. B. 301.



casks of spirits of the plaintiff, who was a spirit merchant and kept a bonded warehouse for his own and other persons' goods, the spirits were to be kept in bond in the plaintiff's warehouse until wanted, the plaintiff sent the defendant an invoice specifying the casks sold and entered the casks in their books as the defendant's, and the defendant afterwards asked the plaintiff to take back the goods or to re-sell them for him; it was held that there was evidence of a delivery and receipt by the conversion of the possession of the plaintiff as owner into a possession as agent for the buyer (*a*).

On the other hand it has been held that there was no evidence of such constructive delivery and receipt in the following cases:—The plaintiff contracted with the defendant to build him a wagon, and while the wagon was in progress the defendant employed a workman upon it to fix on the ironwork and a tilt (*b*):—The defendant purchased several articles at a tradesman's shop, some of which he marked with a pencil, others were measured and cut off larger bulks in his presence; the goods were afterwards sent to his house but he refused to accept them (*c*):—Upon a contract of sale of twelve bushels of tares, being part of a larger bulk, the buyer requested they might remain in the seller's possession until wanted for sowing; the seller measured out twelve bushels and set them apart with orders that they should be delivered to the purchaser when called for (*d*). There can be no delivery and receipt within the statute so long as the seller retains the actual possession of the goods sold with a right of lien for the price (*e*).

**Where the goods remain in the possession of an agent.**—Where the goods at the time of the sale are in the possession of an agent of the seller, the delivery may be effected by a transfer of the right of possession to the buyer, and by the agent continuing to hold them as his agent; for which purpose the assent of the agent is necessary. The plaintiff sold to the defendant a hogshead of wine then lying in the London Docks, and gave him a delivery order; it was held that this was not sufficient to satisfy the statute, and that there could not be any actual receipt of the wine by the vendee until the dock company accepted the order for delivery, and assented to hold the wine as the agents of the vendee (*f*). And where the buyer accepts a delivery order for the goods and keeps it for an unreasonable length of time, it

(*a*) *Castle v. Sworder*, 6 H. & N. 828; 30 L. J. Ex. 310, reversing S. C. in *Exchequer* 5 H. & N. 281; 29 L. J. Ex. 235.

(*b*) *Maberley v. Sheppard*, 10 Bing. 99.

(*c*) *Baldey v. Parker*, 2 B. & C. 37; and see *Hodgson v. Le Bret*, 1 Camp.

233; *Elliott v. Thomas*, 3 M. & W. 170, 177.

(*d*) *Howe v. Palmer*, 3 B. & Ald. 321.

(*e*) *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald. 855; ante, p. 69.

(*f*) *Bentall v. Burn*, 3 B. & C. 423; and see *Bill v. Bament*, 9 M. & W. 36; *Farina v. Horne*, 16 M. & W. 119.

will not alone effect a delivery and receipt of the goods, although the retaining of the order may be evidence of an acceptance (*a*).

**Acceptance and receipt of part of the goods sold.**—By the terms of the statute acceptance and receipt of part of the goods sold is sufficient to except the contract of sale from its operation. The acceptance and receipt of a sample is sufficient part acceptance if the sample forms part of the goods sold (*b*); but not, if the sample is not part of the goods sold (*c*). Taking a sample out of the goods delivered for the purpose of examining the quality with a view to acceptance, does not alone operate as an acceptance, and the buyer may afterwards repudiate the contract (*d*).

Where an order is given for several kinds of goods, or a purchase is made of several parcels of goods in a manner constituting one contract, the acceptance and receipt of one kind, or of one parcel of the goods, is sufficient to take the whole contract out of the operation of the statute (*e*). An order was given for goods, some of which were ready made and the rest were to be manufactured, and the former goods were delivered and paid for; it was held that there was one contract for all the goods, and that the requirements of the statute respecting it were satisfied by the acceptance and receipt of the goods delivered (*f*). The defendant gave an order to the plaintiff's traveller for goods of a certain kind, and at the same time made an offer to take other goods, which offer was then referred to the plaintiff; the plaintiff sent all the goods, and the defendant kept those of the former kind but refused the latter; it was held that there were two separate contracts, and that the acceptance of the one kind of goods did not except the contract for the other kind from the operation of the statute (*g*).

By a verbal contract plaintiff agreed to sell to the defendant a mare for £20, subject to the condition that if it should prove in foal defendant would on receiving £12 from plaintiff return it on request; it was held that there was one entire contract, which was excepted from the operation of the statute by the delivery of the mare, and that the plaintiff might sue the defendant for refusing to return the mare on payment of £12, without a note or memorandum in writing (*h*).

**Giving something in earnest or in part payment.**—The 17th section also excepts from its operation the cases in which “the buyer shall give something in earnest to bind the bargain or in part payment.”

(*a*) *Faring v. Home*, 16 M. & W. 119; and see *ante*, p. 68.

(*b*) *Hinde v. Whitehouse*, 7 East 558.

(*c*) *Cooper v. Elston*, 7 T. R. 14.

(*d*) *Nicholson v. Bower*, 1 El. & El. 172; 28 L. J. Q. B. 97.

(*e*) *Elliott v. Thomas*, 3 M. & W. 170, overruling *Hodgson v. Le Bret*, 1 Camp.

233; *Biggs v. Whisking*, 14 C. B. 195; see *ante*, p. 140.

(*f*) *Scott v. Eastern Counties Ry. Co.* 12 M. & W. 33.

(*g*) *Price v. Lea*, 1 B. & C. 156.

(*h*) *Williams v. Burgess*, 10 A. & E. 499.

A mode of striking a bargain, said to be customary in the north of England, by the buyer drawing a shilling across the hand of the seller, was held not to take the case out of the statute, as it did not amount to payment of the shilling even for a moment (*a*). The plaintiff, being indebted to the defendant, verbally sold to him goods by sample to an amount exceeding the debt, and it was agreed as part of the bargain that the plaintiff's debt should go in part payment of the price of the goods; the goods were sent, but the defendant refused to accept them as being inferior to sample; it was held that there was no part payment within the statute, but only an agreement for part payment contained in the contract itself (*b*).

### § 3. EFFECT OF THE STATUTE OF FRAUDS.\*

Effect upon Contracts within its Operation.....	73	Statute.....	75
As to the Property in Goods sold under such Contracts .....	74	Upon Contracts after Execution in Whole and in Part.....	76
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**Effect of the statute upon contracts within its operation.**—The operation of the statute is expressed in different words in the two sections. By the 4th section it is enacted that “no action shall be brought whereby to charge” a person upon any contract of the kinds therein described; by the 17th section it is enacted that no contract of the kind therein described “shall be allowed to be good.”

Under either section the defendant in an action may deny making the contract by pleading the general issue or a traverse of the contract charged, and avail himself of the defence that the contract comes within the operation of the statute (*c*). A special plea in an action on a contract, that the contract is one within the Statute of Frauds and does not satisfy the formal conditions required to except it from the operation of the statute, used to be held bad on special demurrer before the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 51, where by objections by special demurrer were taken away (*d*). Such pleas, though now admissible, are not necessary, the general issue, as above stated, being sufficient to raise the defence of the statute. If the defendant raises no issue upon the contract pleaded, he is taken to admit it as charged, and has no further opportunity of objecting that it is within the statute (*e*).

(*a*) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(*b*) *Walker v. Nussey*, 16 M. & W. 302.

(*c*) *Johnson v. Dodgson*, 2 M. & W. 653; *Elliot v. Thomas*, 3 M. & W. 170; *Buttmore v. Hayes*, 5 M. & W. 456;

*Eastwood v. Kenyon*, 11 A. & E. 438; *Fricker v. Thomlinson*, 1 M. & G. 772.

(*d*) *Leaf v. Tuton*, 10 M. & W. 393; *Reade v. Lamb*, 6 Ex. 130.

(*e*) Per Alderson, B., *Attorney Gen. v. Sitwell*, 1 You. & Coll. Ex. 559, 577, 583.

\* Ch. I, Sect. V, § 3, Leake.

If no action can be brought upon a contract by reason of the statute, the contract cannot be made available in a plea, replication, or any other pleading (*a*).

A contract purporting to give an interest in land within the 4th section of the statute, as a contract for the purchase of a growing crop of grass with liberty to go on to the land for the purpose of cutting it, and of which there is no signed note in writing, may operate as a license for the buyer to enter upon the land, so as to render the entry lawful until such license is revoked; but it cannot be made available by way of contract to maintain an irrevocable license, or for any other purpose (*b*).

The 4th section of the statute, enacting that "no action shall be brought" upon any of the contracts therein described unless there is a note or memorandum in writing as therein required, is held to apply also to procedure; and therefore, an action cannot be brought upon a foreign contract which falls within the description in that section, without the note or memorandum in writing, although it may be valid according to the law of the place where it was made (*c*).

**Effect of the statutes as to the property in goods sold.**—A contract for the sale of goods coming within the operation of the 17th section is not effectual alone to pass any property in the goods to the buyer; thus, the buyer of goods under a contract which was not allowed to be good by reason of the statute was held not to have an insurable interest in the goods, and consequently not entitled to recover upon a policy effected by him upon the goods (*d*). And the buyer of goods under a contract within the operation of the statute was held not to be entitled to sue for a conversion of the goods by a third party, although before he began his action, but after the conversion committed, he obtained a memorandum in writing sufficient to take the contract out of the operation of the statute (*e*).

Upon a sale of goods within the statute without a written memorandum, the goods were delivered according to the contract when the buyer being in bankrupt circumstances refused to accept them; it was held that the property in the goods never vested in him, and consequently his assignees had no title to them against the seller (*f*). Under a similar contract the goods having been delivered and lying at a railway-station at the order of the buyer, the seller, in consequence

(*a*) *Carrington v. Roots*, 2 M. & W. 248.

(*b*) *Carrington v. Roots*, 2 M. & W. 248; *Crosby v. Wadsworth*, 6 East, 602; and see *ante*, p. 51.

(*c*) *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1; and see *Williams v. Wheeler*, 8 C. B. N. S. 299.

(*d*) *Stockdale v. Dunlop*, 6 M. & W. 224.

(*e*) *Felthouse v. Bindley*, 11 C. B. N. S. 869; 31 L. J. C. P. 204.

(*f*) *Nicholson v. Bower*, 1 El. & El. 172; 28 L. J. Q. B. 97.

of the bankruptcy of the buyer, before any act of acceptance of the goods by him countermanded the delivery; it was held that the property never passed to the buyer, and that his assignees had no claim to the goods (*a*).

Where goods are sold under a contract within the operation of the statute, and are delivered to a carrier named by the buyer, as thereby no property vests in the buyer, he is not competent to sue the carrier for loss of or injury to the goods (*b*); in such case the carrier is liable to the consignor only (*c*); and the consignee cannot acquire a right to sue the carrier by making a part payment, or a part acceptance, or obtaining a memorandum in writing sufficient to except the sale of the goods from the operation of the statute, after the happening of the loss or injury and the accruing of the cause of action (*d*).

**Contracts partly within the statute and partly not.**—Where a contract is, in respect of its matter, partly within the statute and partly not within the statute, and does not satisfy the conditions required to except it from the operation of the statute, it cannot be enforced as to that part which is not within the statute (*e*). The plaintiff charged the defendant upon a contract within the operation of the 4th section, that in consideration that the plaintiff would release a debtor, the defendant promised to pay the debt, and also the expenses which the plaintiff had incurred in seeking to recover it; it was held that the contract was indivisible, and that the plaintiff could not maintain an action to recover the expenses without showing a memorandum in writing (*f*). The plaintiff having taken the goods of his tenant as a distress for rent then due, the defendant promised the plaintiff, in consideration of his abandoning the distress, to pay the rent then due, and also the rent that would become due at the Michaelmas following; it was held that the promise was entire, and the part as to the future rent being within the 4th section of the statute, the plaintiff could not maintain an action upon the contract to recover the past rent without showing a proper memorandum (*g*). A contract, that in consideration that the plaintiff would hire of the defendant a house and furniture, the defendant promised to send in furniture into the house, was held to be inseparable; and as it was within the statute in

(*a*) *Smith v. Hudson*, 34 L. J. Q. B. 145; and see *Bolton v. Lancashire and Yorkshire Ry. Co.*, L. R. 1 C. P. 431.

(*b*) *Coombs v. Bristol and Exeter Ry. Co.*, 3 H. & N. 510; 27 L. J. Ex. 401; see *ante*, p. 68.

(*c*) *Ib.*; and see *Coats v. Chaplin*, 3 Q. B. 483.

(*d*) *Morgan v. Sykes*, cited in *Coats v. Chaplin*, 3 Q. B. 483, 486; per Pollock, C. B., *Coombs v. Bristol and Exeter Ry.*

*Co.*, 3 H. & N. 510, 515; 27 L. J. Ex. 401, 402; per Willes, J., *Bailey v. Sweeting*, 9 C. B. N. S. 843, 856.

(*e*) *Lezington v. Clark*, 2 Vent. 223; *Chater v. Becket*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; and see *Head v. Baldrey*, 6 A. & E. 459.

(*f*) *Chater v. Becket*, 7 T. R. 201.

(*g*) *Thomas v. Williams*, 10 B. & C. 664.

respect of the house, the plaintiff could not sue the defendant for a breach in not sending in the furniture without a memorandum in writing (*a*). The plaintiff agreed to sell to the defendant a mare and foal, and keep and feed them at his own expense until the following Michaelmas, and also to keep and feed another mare and foal of the defendant for six weeks, and the defendant agreed to take the mare and foal and pay to the plaintiff the sum of £30; it was held to be one contract, and as it appeared that the value of the mare and foal was above £10, the contract was within the statute (*b*).

The defendant, being about to take possession of a farm of which the plaintiff was the previous occupier, bargained with him without writing for the sale of the crops, and also of the dead stock, at distinct prices; it was held that the plaintiff might recover the price of the latter, notwithstanding the contract for the crops might be for an interest in land, as they were distinct contracts (*c*). The defendant sold to the plaintiff the possession of a shop and slaughter-house for £37, and it was agreed that in case a license to use the slaughter-house should be refused, the defendant would repay to the plaintiff £10; the plaintiff having taken possession and paid the price, the license was refused, and he sued the defendant for the £10; it was held that he might maintain the action without a written memorandum, because there were substantially two contracts, and the one sued on was not within the statute (*d*).

**Effect of the statute after execution of the contract in whole and in part.**—The execution of the contract, so far as the matter of it is within the statute, does not take the contract out of the operation of the statute, so as to admit of an action upon it in respect of the part remaining executory, although that part taken alone does not relate to a matter within the statute (*e*). The plaintiff agreed to give up the tenancy of a farm to the defendant, in consideration of which the defendant promised to pay the plaintiff £100 when he should become such tenant; the defendant having obtained the possession of the farm as tenant, the plaintiff brought an action on the contract to recover the £100; it was held that the plaintiff could not maintain the action without showing a memorandum of the contract in writing (*f*).

But it seems that a plaintiff might in some cases recover upon a contract implied from the execution of the consideration, where he could not recover upon the original contract by reason of

(a) *Mechelen v. Wallace*, 7 A. & E. 49;

(b) *Harman v. Reeve*, 18 C. B. 587;  
25 L. J. C. P. 257.

(c) *Mayfield v. Wadsley*, 3 B. & C. 357;

(d) *Green v. Saddington*, 7 E. & B.  
503, Crompton, J., *dissentiente*; and see

*Hodgson v. Johnson*, E. B. & E. 685, 690,  
28 L. J. Q. B. 88, 90.

(e) *Cocking v. Ward*, 1 C. B. 858;  
*Teal v. Auty*, 2 B. & B. 99.

(f) *Cocking v. Ward*, 1 C. B. 858.

the statute (a). The defendant being tenant to the plaintiff, it was agreed without writing that, if the plaintiff would consent to an assignment of the tenancy to a third party, the defendant would pay to the plaintiff £40 out of the sum of £100 which the new tenant was to pay him for the assignment; the assignment having been completed and the money paid to the defendant, it was held that the plaintiff might recover his share as money received to his use, although the original agreement as relating to an interest in land came within the operation of the statute (b). The plaintiff let land to the defendant on the terms of being paid a moiety of the crops instead of rent; it was afterwards agreed that the defendant should keep the crops and pay the plaintiff the value of the moiety, and the crops were appraised between them for the purpose of ascertaining the amount; it was held that the plaintiff might recover this sum as the price of the moiety of the crops sold to the defendant, although the original agreement concerning the land was not in writing (c).

Whatever is done in execution of a contract within the operation of the statute is valid, although the contract may be incapable of being enforced by reason of not satisfying the requirements of the statute. Thus, a person, having paid money under a contract within the statute which he cannot enforce for want of a written memorandum, is not, on that account, entitled to recover it back (d). An agent, having paid money by authority of his principal in discharge of a contract within the statute, which could not have been enforced by action, may recover the amount from the principal (e).

An agreement was made to discharge a debt by giving up possession of a public house and stock in trade to the creditor, and the agreement was executed by delivery up and acceptance of the possession; it was held that, though the agreement could not have been enforced for want of evidence to satisfy the statute, it might be proved without writing for the purpose of showing the discharge of the debt (f).

So, the effect of an account stated, admitting a debt and raising an implied contract to pay it, cannot be obviated by showing that the account was stated respecting a debt due under a contract within the operation of the statute, if the consideration of the debt has been completely executed (g); but the effect of such an account stated may be obviated by showing that it was stated respecting a debt under a con-

(a) *Souch v. Strawbridge*, 2 C. B. 808, 814; *Harman v. Reeve*, 18 C. B. 587, 593, 596; see *ante*, p. 24.

(b) *Griffith v. Young*, 12 East, 513.

(c) *Poulter v. Killingbeck*, 1 B. & P. 397.

(d) *Sweet v. Lee*, 3 M. & G. 452.

(e) *Pawle v. Gunn*, 4 Bing. N. C. 445.

(f) *Lavery v. Turley*, 6 H. & N. 239; 30 L. J. Ex. 49.

(g) *Cocking v. Ward*, 1 C. B. 858; *Knowles v. Michel*, 13 East, 249; *Seago v. Deane*, 4 Bing. 459.

tract within the operation of the statute which was executory at the time of stating the account (*a*).

**Effect of part performance in equity.**—In equity part performance of the contract in a material particular takes the contract out of the operation of the statute, upon the ground that it would effect a fraud, if after one party has performed an agreement on his side, the other party should refuse performance of it under a plea of the statute (*b*).

A marriage taking place in pursuance of a parol agreement made in consideration of marriage is held not to be a part performance within the rule of equity (*c*); a marriage settlement made in pursuance of such agreement is such a part performance (*d*).

Part performance by the party to be charged will not take a case out of the operation of the statute within the rule of equity (*e*).

There is no similar doctrine in law respecting part performance of the contract (*f*); but the 17th section, relating to contracts for the sale of goods above the value of ten pounds, expressly excepts from its operation those cases in which there has been a part acceptance of the goods sold, or a part payment of the price (*g*).

(*a*) *Earl Falmouth v. Thomas*, 1 C. & M. 89.

(*b*) Story, *Equity Jur.* § 759, 760; *Nunn v. Fabian*, L. R. 1 Ch. Ap. 35; 35 L. J. C. 140.

(*c*) *Lassence v. Tierney*, 1 Mac. & Gord. 551, 571; *Caton v. Caton*, 34 L. J.

C. 564; 35 *ib.* 292; L. Rep. 1 Ch. Ap. 137.

(*d*) *De Biel v. Thompson*, 3 Beav. 469.

(*e*) *Caton v. Caton*, L. R. 1 Ch. Ap. 137; 35 L. J. C. 292.

(*f*) See *Massey v. Johnson*, 1 Ex. 241, 252.

(*g*) See *ante*, p. 72.



## CHAPTER II.

### THE MATTER OF CONTRACTS.

#### SECTION I. THE CONSIDERATION.\*

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**The matter of contracts.**—In contracts which are founded upon agreement the matter of the contract is comprised in the terms of the agreement. The matter of the agreement may be varied according to the object to be effected; and contracts may be specifically distinguished, according to the matters and purposes to which they are applied;—as, contracts of sale, of land, or of goods; contracts between landlord and tenant; contracts of bailment; of carriers; contracts of insurance; of guarantee; bills of exchange and promissory notes; and others.

The general rules and principles of the law of contract receive a particular application in each distinct species of contract; and the investigation in detail of that application constitutes the law of that species of contract. Such detailed investigation is the proper subject of separate treatises, and is not within the limits of an elementary treatise, which is concerned only with the general rules and principles of the law of contract, and their general application. The matter of a contract, however, is subject to various modifications and considerations of a general character, attended with general results and consequences, and independent of the specific application or purpose of the contract; and these general characteristics of the matter of a contract require here to be noticed.

The matter of an agreement creating a contract, it has been shown, consists in a promise, and, if the promise is given for a consideration,

\* Ch. III, Sect. I, Leake.

in the consideration for the promise (a). The consideration and the promise, as forming the matter of the contract, may be conveniently treated of separately.

**The consideration.—When necessary.—Simple contracts.**—The consideration is the equivalent or return for which the promise is given ; and in the English law it is a necessary element in an agreement, besides the promise, in order to create a contract by mere agreement. The object of this requirement is to avoid the risk of giving a binding effect to promises made inadvertently, and without an obligatory intention ; and with this object the law provides that all promises not made by way of bargain, in return for a valid consideration, are void of effect as simple contracts (b).

**Contracts under seal.**—Contracts made in the form of a deed under seal, or created by record do not require a consideration. The formality of the contract alone gives sufficient security of a deliberate intention and renders the promise legally binding. Hence, gratuitous promises, which are not given, by way of bargain, for a consideration, though they cannot be made binding in the form of a simple contract, may be rendered obligatory by using the form of a contract under seal. A deed may also be used to give effect to an agreement containing a valid consideration ; and in such case, if the deed does not state the consideration, or does not state it completely, the parties may prove the consideration, if required, by extrinsic evidence, provided it is not inconsistent with the deed (c).

**Bills of exchange and promissory notes.**—An apparent exception to the rule that a consideration is essential in simple contracts arising from agreement occurs in bills of exchange and promissory notes. Bills of exchange by the custom of merchants are valid without the consideration appearing in express terms on the face of the instrument (d) ; and promissory notes are placed on the same footing with bills of exchange, in this respect, by the statute 3 & 4 Anne, c. 9 ; so that the payee or indorsee of a promissory note may maintain an action upon it, in the same manner as upon a bill of exchange, without allegation or proof of a consideration for the promise (e).

A consideration is really necessary in these contracts, as it is in all other simple contracts arising from agreement ; but a bill of exchange or a promissory note raises a *prima facie* presumption of value received for it, sufficient to sustain the promise, without further proof of consid-

(a) See *ante*, pp. 2, 3.

(b) *Ante*, p. 3.

(c) *Ante*, p. 32; *Leifchild's case*, L. R. 1 Eq. 321.

(d) *Pillans v. Mierop*, 3 Burr. 1672, 1674.

(e) See *Clerke v. Martin*, 2 L. Raym. 757; *Brown v. Harraden*, 4 T. R. 148; Byles on Bills, 8th ed. 108.

eration (a). The original negotiation and every indorsement of these instruments is presumed to have been made for value, until such presumption is rebutted by proof to the contrary (b). Consequently, if the consideration of a bill of exchange or promissory note is put in issue, the *onus probandi* lies on the party denying the consideration (c). There is a rule of law, however, that proof of fraud or illegality in the inception of the bill, or that it has been lost, or stolen, will turn the presumption the other way, and will compel the holder to prove that he gave consideration for it (d).

**Adequacy of the consideration.**—The adequacy of the consideration, in point of value, as an equivalent for the promise is immaterial in English law. The parties are at liberty to make what bargains they please; and provided the consideration agreed upon is such that the law can recognize its existence the adequacy of it in value as a return for the promise is left wholly to the estimation of the parties to the agreement (e).

The consideration that the plaintiff would give up to the defendant a document, purporting to be a guarantee, was held sufficient, notwithstanding the document intended in the agreement and given up to the defendant was invalid as a guarantee; the Court saying that they could not inquire into the object or motive of the defendant in wanting the document (f). The execution by the plaintiff of an indenture of apprenticeship for binding the defendant's son to him as apprentice, was held to be a sufficient consideration for an I. O. U. given by the defendant to secure the premium, although the indenture was void by the statute 8 Anne, c. 9, s. 38, for not truly setting forth the consideration (g). The consideration that the plaintiff consented to allow the defendant to weigh two boilers of the plaintiff was held sufficient; because the defendant could not have obtained it without the plaintiff's consent, and the Court could not inquire into his reasons for wanting it, or what benefit he expected to derive (h).

**Good and valuable considerations.**—For some purposes what is

(a) Per Abbott, C.J., *Holliday v. Atkinson*, 5 B. & C. 501, 503.

(b) See Byles on Bills, 8th ed. 108.

(c) *Mills v. Barber*, 1 M. & W. 425.

(d) *Mills v. Barber*, 1 M. & W. 425, 432; *Bailey v. Bidwell*, 13 M. & W. 73; *Smith v. Braine*, 10 Q. B. 244; 20 L. J. Q. B. 201; *Harvey v. Towers*, 6 Ex. 656; *Mather v. Lord Maidstone*, 1 C. B. N. S. 273; 26 L. J. C. P. 58.

(e) Per Alderson, B., *Pilkington v. Scott*, 15 M. & W. 657, 660; *Hitchcock v. Coker*, 6 A. & E. 438, 456; *Skeate v. Beale*, 11 A. & E. 983, 992.

(f) *Haigh v. Brooks*, 10 A. & E. 309.

(g) *Westlake v. Adams*, 5 C. B. N. S. 248; *dissentiente Williams, J.*; and see *Jackson v. Warwick*, 7 T. R. 121.

(h) *Bainbridge v. Firmstone*, 8 A. & E. 743.

called a *good* or *meritorious* consideration is recognized as distinguished from a *valuable* one. According to Blackstone "a good consideration is such as that of blood, or of natural love and affection,—being founded on motives of generosity, prudence, and natural duty."

The phrase "good consideration," as thus explained, imports merely the motive of natural affection towards relations, and excludes the element of compensation or equivalent for the promise which is essential to constitute a legal consideration. Hence a promise impelled by a *good* consideration only is a gratuitous promise (*a*).

**The consideration must move from the plaintiff.**—It is sometimes laid down as a distinct rule that "the consideration for a promise must move from the plaintiff," than which, it is said, "no rule is more clear in law" (*b*). In the case of *Price v. Easton* the declaration stated that W. P. owed the plaintiff £13, and that in consideration thereof and that W. P. had promised the defendant to work for him at certain wages and leave the amount in his hands, the defendant promised to pay the plaintiff the sum of £13; upon demurrer, the declaration was held bad, because "it did not show any consideration for the promise moving from the plaintiff to the defendant" (*c*). The meaning of which rule seems to be that the matter of the consideration must be done or suffered by the promisee himself, or, if by a third party, at the request and by the procurement of the promisee, and as the agreed equivalent for the promise; and, with this meaning, the rule seems to import no more than is necessarily implied in the conception of a consideration for the promise as already explained (*d*).

**Executed and executory considerations.**—The consideration of a promise may be some matter executed or done at the same time as the promise is given, and in return for which it is given; as goods sold and delivered, work performed, money paid or lent, etc.; or it may be a promise to perform some matter in return for the promise then given, as a promise to deliver goods, or perform work, or pay money, etc. In the former case the consideration is called an executed consideration; in the latter it is called an executory one (*e*).

(*a*) 2 Bl. Com. 297; Story, Eq. Jur. § 354; and see *Bret v. J. S.*, Cro. Eliz. 756; *Tweddle v. Atkinson*, 1 B. & S. 393, 398. It seems that the only purpose for which a *good* consideration may be effectual is to support a covenant to stand seised to uses; see 2 Bl. Com. 337; Shep. Touch. 512; Hayes' Introd. to Convey., 5th ed. 102. Deeds made upon good consideration only are considered as merely voluntary and are held void as against creditors and *bonâ fide* purchasers for value, 2 Bl. Com.

297; *Gully v. Bishop of Exeter*, 10 B. & C. 584, 606; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Buckle v. Mitchell*, *ib.* 100; Story, Eq. Jur. §§ 353, 425.

(*b*) *Smart v. Chell*, 7 Dowl. 781; and see 2 Wms. Saund. 137 *g*.

(*c*) *Price v. Easton*, 4 B. & Ad. 433; and see *Crow v. Rogers*, 1 Str. 592, cited *post*, p. 508; and see the rule there stated as to parties.

(*d*) See *ante*, p. 3

(*e*) See *ante*, p. 4.

It is important to observe the distinction between a contract containing an executory consideration, and a mere offer or proposal of a contract upon a consideration then executory which first becomes a complete contract by the performance of the consideration; as where a request is made to perform the consideration upon certain terms, which may be accepted by a performance of the consideration according to the request (*a*). In the latter case there is no contract until the consideration is executed; and in the meantime the request or offer of the contract may be withdrawn. In the former case there is a binding contract independent of the execution of the consideration; the promise of performance and not the performance constituting the consideration, and the contract consisting of promises on both sides which cannot be withdrawn after they have been mutually exchanged.

So far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration, if promised, is sufficient to form a good executory consideration; so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration.

**Past consideration.**—A matter executed and past before the time of making the promise cannot constitute a valid consideration; for to give a promise in return for a past matter only must necessarily be a voluntary and gratuitous act (*b*). In the case of *Roscorla v. Thomas*, the declaration, stating that in consideration that the plaintiff *had* bought a horse of the defendant at a certain price, the defendant promised that the horse was sound, was held bad; because the sale of the horse alleged to be the consideration for the promise was stated as past before the promise was made (*c*). Upon the same principle past debts are not a sufficient consideration for a guarantee of such debts, but giving credit in future, or any other sufficient consideration, will support a promise to guarantee all debts past as well as future (*d*). A promissory note, given as a reward for past services which had been rendered gratuitously, was held not to be binding (*e*).

It may here be noticed that where a contract is made upon an executed consideration, either by the consideration being executed upon

(*a*) See *ante*, p. 14.

(*b*) See *Lampleigh v. Brathwait*, Hob. 105; 1 Smith, L. C. 5th ed. p. 135; *Hunt v. Bate*, Dyer, 272 *a*; *Eastwood v. Kenyon*, 11 A. & E. 438, 452; per Tyndal, C. J., *Thornton v. Jenyns*, 1 M. & G. 166, 188; *Raleigh v. Atkinson*, 6 M. & W. 670.

(*c*) *Roscorla v. Thomas*, 3 Q. B. 234.

(*d*) *Johnston v. Nicholls*, 1 C. B. 251; *Boyd v. Moyle*, 2 C. B. 644; *White v. Woodward*, 5 C. B. 810; *Hoad v. Grace*, 7 H. & N. 494; 31 L. J. Ex. 98.

(*e*) *Hulse v. Hulse*, 17 C. B. 711; 25 L. J. C. P. 177.

request, or by the acceptance of the executed consideration, the consideration is not executed and past before the promise is made; but the execution of the consideration and the making of the promise are regarded in law as concurrent acts (*a*). In such contracts the only binding promise is that expressed or implied at the time of the execution of the consideration; and a promise subsequently made, in respect of the same consideration, however expressed, would be void, as being made on a past consideration; the only effect such a promise could have, would be by way of admission of the prior liability (*b*). A declaration, charging a debt for work and labor done by the plaintiff for the defendant, in consideration whereof the defendant *afterwards* promised to pay, was held bad, because it stated a past consideration, and did not show that the consideration was executed at the request of the defendant, or was accepted by him (*c*). In the case of *Lamp-leigh v. Brathwait* (*d*) the declaration claimed for services rendered by the plaintiff at the request of the defendant, alleging that afterwards, in consideration thereof, the defendant promised, etc.; and it was held good, because the services rendered at the request of the defendant implied a promise to pay for them, and the subsequent promise, which alone would not have been binding, merely related back to the original request.

**Promise to perform previous moral obligation.**—The doctrine prevailed for some time in the English law that an express promise to perform a previously existing moral obligation created a valid contract without any consideration of value; and the contract was then said to be made upon a moral consideration. But it is clear that a promise, if moved by a sense of moral obligation only, is, strictly speaking, gratuitous; and it has been at length decided that no contract arises, in general, in such case.

It was said by Lord Mansfield, C. J., that "where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration" (*e*). The case of *Lee v. Muggeridge* (*f*) continued for some time to be the leading authority upon this point: a woman married, and therefore incompetent to contract, gave a bond for repayment by her executors, of money advanced at her request to her son-in-law. After her husband's death she promised in writing that her executors should settle

(*a*) See *ante*, p. 18.

(*b*) *Hopkins v. Logan*, 5 M. & W. 241; *Kaye v. Dutton*, 7 M. & G. 807; 815; *Roscorla v. Thomas*, 3 Q. B. 234.

(*c*) *Hayes v. Warren*, 2 Strange, 933.

(*d*) 1 Smith's L. C. 5th ed. 135; *ante*, p. 14.

(*e*) *Hawkes v. Saunders*, Cowp. 289, 290; and see *Atkins v. Hill*, Cowp. 284, 289; per Mansfield, C. J., *Gibbs v. Merrill*, 3 Taunt. 307, 311; per Lord Ellenborough, C. J., *Atkins v. Banwell*, 2 East, 505, 506.

(*f*) 5 Taunt. 36

the bond. It was held that that promise was binding upon her executors. Mansfield, C. J., said "It has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question, therefore, is whether there appears a good moral obligation. Now I cannot conceive that there can be a stronger moral obligation than is here stated. Here is a debt, created at the desire of the testatrix, lent in fact to her, though paid to her son-in-law. After her husband's death, she, knowing that this bond had been given, that her son-in-law had received the money and had not repaid it, knowing all this she promises that her executors shall pay. If then it has been frequently decided that a moral consideration is a good consideration for a promise to pay, this declaration is clearly good."

This doctrine after prevailing for some time and causing much uncertainty and confusion in the law of simple contracts was finally overruled in the case of *Eastwood v. Kenyon* (a). The question there arose, upon a motion in arrest of judgment, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff had voluntarily acted as guardian and agent for the defendant's wife while she was a minor and unmarried, and had voluntarily expended money for the improvement of her estate, and had obtained the money for that purpose by borrowing it upon his promissory note, and that the defendant's wife had received the benefit of the expenditure, and after she came of age promised to pay the note, and after the marriage with the defendant, in consideration of the premises, the defendant promised to pay the note. It was argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise; but the Court, in a judgment in which all the authorities on the subject were reviewed, refused to acknowledge the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, and held the declaration to be bad, because it stated no consideration, but a past benefit, not conferred at the request of the defendant. In commenting on the doctrine in question they said:—"The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would

(a) 11 A. & E. 438; and see *Wennall v. Adney*, 3 B. & P. 249, note (a).

also be multiplied, to the prejudice of real creditors" (a). The law has since been considered as settled in accordance with this judgment (b).

There are some instances of promises which used to be referred to the principle of previous moral obligation, and which were still held to be binding, although that principle was rejected. Lord Mansfield gave the following, amongst other instances, as applications of the principle, namely:—A promise in renewal of a debt barred by the Statute of Limitations,—a promise after full age to pay a debt contracted during infancy,—a promise by a person formerly bankrupt to pay a debt discharged by his certificate (c). The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection; it was laid down "that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it" (d).

Promises to pay debts barred by bankruptcy were deprived of all binding effect by the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 204, repealed but re-enacted in substance by the Bankruptcy Act, 1861. By the latter Act, 24 & 25 Vict. c. 134, s. 164, it is enacted that "After the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt claim or demand provable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication." The above enactment, it may be observed, prevents any liability to pay debts provable under the bankruptcy arising from contracts, promises, or agreements, even when made upon a new and valid consideration; so that a bankrupt cannot by any mode contract to pay a debt discharged by bankruptcy (e).

Promises to pay debts barred by the Statutes of Limitation, and promises to pay debts contracted during infancy are treated more appropriately in connection, respectively, with the subjects of the limitation of actions on contracts, and the effect of infancy on the capacity to contract (f).

**Promise to perform previous legal obligation.**—An express promise to perform a previous legal obligation, if made gratuitously and

(a) 11 A. & E. 450.

(b) *Beaumont v. Reeve*, 8 Q. B. 483, 487; *Jennings v. Brown*, 9 M. & W. 495, 591.

(c) *Hawkes v. Saunders*, Cowp. 289, 290.

(d) *Earle v. Oliver*, 2 Ex. 71, 89; *Flight*,

*v. Reed*, 1 H. & C. 713, 716; 32 L. J. Ex. 265, 268; *Wennall v. Adney*, 3 B. & P. 249, note (a).

(e) *Ashley v. Killick*, 5 M. & W. 509.

(f) See *post*, Chap. XIII, Sect. XI, "Statutes of Limitations;" *post*, Chap. VI, Sect. II, "Capacity of Parties."



without some new consideration to support it, does not alone create any new obligation. Thus, if a person promises to pay in one right what he was previously liable to pay in another, as if a person promise to pay as his own debt a debt due from him as executor only, such promise is not binding without a new consideration (*a*). So, if a person being liable to another for unliquidated damages for an injury, promises to pay him a certain sum of money, such promise is merely gratuitous and void, unless made upon some consideration, as of a release of the right of action for damages or of staying proceedings in such action (*b*). A promise to pay a bill of exchange which had been accepted by the defendant was held invalid, there being no new consideration to support the promise, notwithstanding the bill had been lost, and therefore could not be put in suit (*c*).

**Consideration of previous legal obligation.**—Conversely, the performance of, or a promise to perform, what a person is under a previous legal obligation to perform, forms no new matter for a consideration and cannot support a promise. Thus, the payment of a debt which a person is under a legal obligation to pay will not support a promise made to him in consideration of his so doing (*d*). So, if a debt from its nature carries interest, an agreement for the creditor to give an extended time for payment in consideration of the debtor paying the interest during that time, is void for want of consideration (*e*).

So, payment of part of a debt is alone no consideration for the discharge or forbearance of the residue (*f*). But in arrangements made between a debtor and his creditors to pay a composition for his debts, the giving up a part of their claims by the other creditors is a valid consideration for each one giving up a part of his and accepting the composition in lieu of the whole; and so the payment or promise to pay the composition becomes a good consideration for the agreements of the creditors (*g*). Where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand is a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs; and according to Littledale, J., upon the authority of the case of *Reynolds v. Pinhowe* (*h*), even in the case of a liquidated demand the payment of such demand would be a good consideration for the same promise (*i*).

(*a*) *Rann v. Hughes*, 7 T. R. 350 (*a*); ante, p. 43.

(*b*) *Smart v. Chell*, 7 Dowl. 781; and see *Wilkinson v. Byers*, 1 A. & E. 106; *Crowther v. Farrer*, 15 Q. B. 677.

(*c*) *Davis v. Dodd*, 4 Taunt. 602.

(*d*) *Jones v. Waite*, 5 Bing. N. C. 341, 356.

(*e*) *Orme v. Galloway*, 9 Ex. 544; 23 L. J. Ex. 118.

(*f*) *Down v. Hatcher*, 10 A. & E. 121;

*Smith v. Page*, 15 M. & W. 683; and see post, Chap. XIII, Sect. VII, "Payment."

(*g*) *Steinman v. Magnus*, 11 East, 390; *Good v. Cheesman*, 2 B. & Ad. 328; *Norman v. Thompson*, 4 Ex. 755; *Boyd v. Hind*, 1 H. & N. 938, 947; 26 L. J. Ex. 164, 166.

(*h*) Cro. Eliz. 429.

(*i*) *Wilkinson v. Byers*, 1 A. & E. 106; and see *Crowther v. Farrer*, 15 Q. B. 677.

A promise to pay a witness at a trial compensation for his loss of time, in consideration of his attendance and evidence, is void; because the witness is bound by law upon his subpoena to attend and give evidence, without any other charge than for his expenses (*a*). A promise to pay money to a sheriff, in consideration of his doing that which he is bound by law to do without remuneration, as executing a writ of *elegit*, is void (*b*). The defendant offered a reward to whoever could give him such information as would lead to the conviction of a felon, and the plaintiff, a police constable, gave the required information and claimed the reward; the defendant disputed the plaintiff's right to claim the reward on the ground that he was legally bound as constable to give information, so that there was no consideration for the defendant's promise to pay him; but the Court held that as there might be information which the defendant was not bound as a constable to give, there might be a sufficient consideration to support the promise (*c*).

So, generally, where a contract is complete and binding, however it arose, a promise by one of the parties to perform what he is bound to do by the contract is not a sufficient consideration to support a new promise by the other party (*d*). Where seamen have bound themselves by articles of agreement to serve for a whole voyage, the mere performance of their duties during the voyage forms no consideration for promises of increased pay; so, where some of the crew of a ship had deserted, a promise made by the captain to the remainder of the crew, who were before bound by articles of agreement to complete the voyage, to give them increased wages merely for continuing the voyage was held void for want of consideration (*e*). But seamen are not bound to continue a voyage under circumstances dangerous to life; so, where in consequence of desertions it became dangerous to continue the voyage, the remaining seamen, not being bound to proceed, were at liberty to make a new contract stipulating for increased pay (*f*).

If a man has already contracted with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual; but where there has been a promise to one person to do a certain thing, it is possible to make a promise to another to do the same thing, which may form a valid consideration in a contract with that other. As, where the plaintiff had contracted with another to deliver coals to the defendant, and afterwards by an

(*a*) *Willis v. Peckham*, 1 B. & B. 515;  
*Collins v. Godefroy*, 1 B. & Ad. 950.

(*b*) *Bridge v. Cage*, Cro. Jac. 103.

(*c*) *England v. Davidson*, 11 A. & E.  
856.

(*d*) *Jackson v. Cobbin*, 8 M. & W.  
790.

(*e*) *Stilk v. Myrick*, 2 Camp. 317;

*Harris v. Watson*, Peake, 72; *Frazer v. Hatton*, 2 C. B. N. S. 512; 26 L. J. C. P. 226; and see *Clutterbuck v. Coffin*, 3 M. & G. 842; *Harris v. Carter*, 3 E. & B. 559; 23 L. J. Q. B. 295.

(*f*) *Hartley v. Ponsonby*, 7 E. & B. 872; 26 L. J. Q. B. 322.

other contract made with the defendant, in consideration that the plaintiff would deliver the same coals to the defendant, the defendant promised the plaintiff to unload and discharge the coals in a certain manner, the consideration was held sufficient to support the promise of the defendant (*a*).

If money is paid to induce a person to do what he is under a previous legal obligation to do, the payment is, in general, considered as an involuntary payment, and the money may be recovered back.

**Impossible consideration.**—Where the consideration of a contract is executory, that is to say, in the form of a promise, it must, as a general rule, be possible of performance; for a consideration impossible of performance would be equivalent to none. The effect of impossibility of performance upon an agreement, both where it exists at the time of making it, and where it supervenes subsequently, is treated of in a separate section (*b*).

**Illegal consideration.**—The consideration for a promise must also be legal; a promise founded on an illegal consideration is void. There is no difference, in this respect, between considerations executed and executory; a matter which is illegal is equally inefficacious to support a promise both before it is executed and after complete execution. The effect of illegality in the matter of a contract is treated in a separate section (*c*).

**Consideration partly void.**—Where the alleged consideration of a promise is partly void, but on grounds not tainted with illegality, if a sufficient consideration remains, the contract is good and the promise binding; so where one promise is alleged to be made upon several considerations, and one or more of them is void, or insufficient in matter of form, yet if one of such considerations is good the promise will be supported (*d*). In the case of *Shackell v. Rosier*, Tindal, C. J., said:—"When a promise rests on two considerations, one of which is impossible or unintelligible, you may reject the impossible or unintelligible, and resort to that which is possible and plain. But all the books take a distinction as to the case where part of the consideration is illegal." In that case the contract between the plaintiff and the defendant was that, in consideration of the plaintiff publishing a libel

(*a*) *Scotson v. Pegg*, 6 H. & N. 295; 30 L. J. Ex. 225; and see *Shadwell v. Shadwell*, 9 C. B. N. S. 159; 30 L. J. C. P. 145.

(*b*) *Post*, Chap. II, Sect. II, "Impossible Contracts."

(*c*) *Post*, Chap. X, "Illegal Con-

tracts;" where see also as to the effect of illegality of part of the consideration.

(*d*) *Bradburne v. Bradburne*, Cro. Eliz. 149; *Colson v. Carr*, Cro. Eliz. 848; *Ring v. Roxbrough*, 2 C. & J. 418; *King v. Sears*, 2 C. M. & R. 48.

and defending an action for its publication, the defendant promised to indemnify the plaintiff from the costs; the consideration being illegal at least so far as regarded the publication of the libel, the contract was held altogether void, and the plaintiff not entitled to recover on the indemnity (*a*).

If in a declaration a material part of the consideration is alleged untruly, or is omitted, or is not proved, it would create a variance which, if not amended, would be a ground of nonsuit (*b*). Where the contract was stated in the declaration to be the sale of a horse for £63, and the consideration proved was that the plaintiff should pay that sum, and if the horse was lucky should give the defendant £5 more or the buying of another horse, it was held to be no variance; Lord Tenterden, C. J., said: "The substantial and operative part of the consideration is sufficiently alleged in the declaration.—The remaining part is much too loose and vague to be considered in a court of law" (*c*).

**Failure of consideration.**—In contracts with an executory consideration, if the performance or fulfilment of the consideration forms a condition precedent to the liability under the contract, the failure of the consideration discharges that liability. If the performance or fulfilment of the consideration does not form a condition precedent to the liability under the contract, but consists of an independent promise, the failure in the performance of the consideration does not affect the liability on the other side, and has the effect only of a breach of the contract, giving a right of action for damages (*d*).

Where money has been paid for a consideration which entirely fails, the money may, in some cases, be recovered back.

**Matter of the consideration.**—The matter of the consideration required to support a promise must consist of some benefit or advantage to the promiser, or some loss or disadvantage to the promisee, in return for which the promise is made (*e*). The following definition of a consideration was adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant* (*f*):—"It is defined to be any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed

(*a*) *Shackell v. Rosier*, 2 Bing. N. C. 634.

(*b*) See *Colson v. Carr*, *supra*; 1 Chitty on Pleading, 7th ed. 304.

(*c*) *Guthing v. Lynn*, 2 B. & Ad. 232; and see *Thomas v. Thomas*, 2 Q. B. 851; *Crisp v. Gamel*, Cro. Jac. 128.

(*d*) See *post*, Chap. XII.

(*e*) *Greenleaf v. Barker*, Cro. Eliz. 193; see per Buller, J., *Nerot v. Wallace*, 3 T. R. 17, 24; per Lord Ellenborough, C.J., *Bunn v. Guy*, 4 East, 190, 194; *Williamson v. Clements*, 1 Taunt. 523.

(*f*) 3 Scott, 238, 250, quoting Selwyn's N. P. tit. Assumpsit, 8th ed. p. 47; 2 Wms. Saund. 137 *h*.

or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant, or in the language of pleading, at the special instance and request of the defendant."

The matter of the consideration may tend to the benefit of the defendant, or of a third party, or may not be beneficial to anybody; the mere fact of the promiser himself obtaining no benefit in return for his promise is immaterial, provided he has made the promise in order to obtain the consideration from the plaintiff, and as the agreed equivalent for it (*a*). For example, in contracts of guarantee "it is enough if the person for whom the guarantor becomes surety derives a benefit, or the person to whom the guarantee is given suffer inconvenience, as an inducement to the surety to become guarantee for the principal debtor" (*b*).

What matters will serve to form the consideration for a promise may be conveniently shown by some of the decisions concerning the sufficiency of considerations.

**Forbearance of rights or claims.**—Forbearance of legal proceedings by a person entitled to sue, for a certain specified time, is a valid consideration for a promise (*c*); forbearance by the plaintiff, who was merely a receiver appointed by the Court of Chancery, was held a good consideration for a promise by the defendant to pay the debt (*d*). Forbearance by a creditor to sue an executor for a debt of his testator until a certain time was held a valid consideration to support a promise by the executor to pay the debt himself (*e*).

A guarantee of a debt, expressed to be made "in consideration of your forbearing to press for immediate payment of the debt," no time being specified, was held to be made upon a sufficient consideration, and was considered as importing a forbearance to sue for a reasonable time (*f*). A guarantee was made to the effect that in consideration of the plaintiff forbearing to take any proceedings against the debtor (no time being specified), the defendant guaranteed to the plaintiff payment of the debt upon a fixed day; it was held that the guarantee imported a forbearance to sue the debtor until the day fixed, and that such forbearance was a condition precedent to the liability upon the guarantee (*g*). A promissory note given for an existing debt is evidence of an agreement to suspend the remedy for the debt until the

(a) See per Yates, J., *Pillans v. Mierop*, 3 Burr. 1663, 1673; per Lord Ellenborough, C.J., *Jones v. Ashburnham*, 4 East, 455, 463; *Bailey v. Croft*, 4 Taunt. 611.

(b) *Morley v. Boothby*, 3 Bing. 107, 113.

(c) *Willatts v. Kennedy*, 8 Bing. 5.

(d) *Id.*

(e) *Fisher v. Hall*, Cro. Jac. 47, and see *Rann v. Hughes*, 7 T. R. 350 n. (*a*); *Davis v. Reyner*, 2 Lev. 3; ante, p. 44.

(f) *Oldershaw v. King*, 2 H. & N. 517; 27 L. J. Ex. 120; but see *Semple v. Pink*, 1 Ex. 74.

(g) *Payne v. Wilson*, 7 B. & C. 423; *Rolt v. Cozens*, 18 C. B. 673; 25 L. J. C. P. 254.

note is due, which is a sufficient consideration to support the note (*a*). A creditor applied to his debtor for security for the debt, and in consequence of the application the debtor promised to give certain security; it was held that, though there was no promise by the creditor to abstain from suing for any given time, yet the effect being that the debtor did in fact receive the benefit of some degree of forbearance, there was sufficient consideration to support the promise, and the creditor was entitled to the benefit of the promised security (*b*).

A parol undertaking not to enforce the covenants in a deed executed by the defendant is a good consideration for a promise of the defendant, although such undertaking, not being under seal, has no legal effect upon the deed, and does not release the covenants; for an action might be maintained for a breach of such undertaking (*c*).

Forbearance by the plaintiff to sell the goods of a third person under a bill of sale, or to execute a writ of *fi. fa.* against the goods of a third person, is a sufficient consideration for a promise by the defendant to pay the debt (*d*); and such consideration would support a promise to pay even a larger amount than the debt (*e*).

Forbearance to apply to the magistrates for an order of affiliation of a bastard child against the defendant was held a valid consideration for a promise to pay for its maintenance (*f*).

The release of a right of action for unliquidated damages for a tort is a valid consideration for a promise to pay a fixed sum (*g*). So, to stay proceedings in an action then pending, or a promise to stay proceedings in such action, is a sufficient consideration for a promise by the defendant (*h*).

The discharge of the defendant from arrest forms a valid consideration for a promise by him, if the arrest was legal (*i*).

**Equitable rights as matter of consideration.**—Equitable rights, that is to say, such as are enforced only in a court of equity, are recognized in courts of law as providing sufficient matter for the consideration of a contract, in respect of the forbearance, release, or assignment of such rights (*j*). In the case of a mortgage, courts of law will take notice that the mortgagor has an equity of redemption in Chancery, so far as to recognize a release of the equity of redemption as a valid consideration (*k*). Forbearance of a suit for a legacy, which

(*a*) *Baker v. Walker*, 14 M. & W. 465.  
 (*b*) *The Alliance Bank v. Broom*, 2 Dr. & Sm. 289; 34 L. J. C. 256.  
 (*c*) *Nash v. Armstrong*, 10 C. B. N. S. 259.  
 (*d*) *Barrell v. Trussell*, 4 Taunt. 117;  
*Pullin v. Stokes*, 2 H. Bl. 312.  
 (*e*) *Smith v. Algar*, 1 B. & Ad. 603.  
 (*f*) *Linnegar v. Hodd*, 5 C. B. 437.

(*g*) See *Smart v. Chell*, 7 Dowl. 781;  
*Wilkinson v. Byers*, 1 A. & E. 106.  
 (*h*) *Crowther v. Farrer*, 15 Q. B. 677.  
 (*i*) *King v. Hobbs*, Yelv. 26; *Smith v. Monteith*, 13 M. & W. 427.  
 (*j*) *Wells v. Wells*, 1 Vent. 40.  
 (*k*) *Thorpe v. Thorpe*, 1 L. Raym. 663.

cannot be recovered in law and therefore is merely an equitable claim, was held a valid consideration to charge an executor upon his own promise to pay it (*a*).

Though a contract, as a general rule, is not assignable at law, so as to enable the assignee to sue upon the contract in his own name, it is assignable in equity so as to enable the assignee to enforce the contract in the name of the assignor; and courts of law recognize such assignment as affording a valid consideration (*b*). Thus, the assignment of a debt, though of uncertain amount (*c*), and the assignment of the benefit of a contract for the purchase of land is a valid consideration (*d*). Forbearance by the assignee of a contract, although his right is only equitable, is recognized at law as a valid consideration, as forbearance by the assignee of a bond (*e*).

**Pretended and supposed rights.**—A consideration consisting of a release, assignment, or forbearance, must be grounded on a valid right, legal or equitable, or at least upon a doubtful claim to a right; a mere pretended claim, or a claim to what does not amount to a right, is not a sufficient ground for such a consideration.

The surrender of a tenancy at will is not a valid consideration, because a tenancy at will is no right at all, being determinable by a word at the will of the landlord (*f*). A release by the plaintiff of all interest in an estate, reserving his lien, where it appeared that he had no interest other than a lien, was held not a sufficient consideration (*g*). The withdrawal of complaints by a son against his father, respecting the manner in which the father had distributed his property, was held no consideration to support a promise by the father (*h*). A promissory note given for future services which the payee was expected to render, but which he was not under legal obligation to render, was held void for want of consideration (*i*). An agreement made between the assignee of the tenant for life of an estate and the remainderman, in consideration of the former forbearing from cutting the timber, which it turned out he had no right to do in consequence of the death of the tenant for life, unknown to both parties, before the date of the agreement, was held void for want of consideration (*j*).

Forbearance to sue where there is no cause of action is not a sufficient consideration; as, forbearance to sue a widow upon a promissory note made while under coverture (*k*); forbearance to sue an heir on

(*a*) *Davis v. Reyner*, 2 Lev. 3.  
 (*b*) *Per Buller, J., Master v. Miller*,  
 4 T. R. 320, 341.  
 (*c*) *Mouldsdales v. Birchall*, 2 W. Bl.  
 820.  
 (*d*) *Price v. Seaman*, 4 B. & C. 525.  
 (*e*) *Morton v. Burn*, 7 A. & E. 19.  
 (*f*) *Richardson v. Mellish*, 2 Bing.

229, 244; *Longridge v. Dorville*, 5 B. &  
 Ald. 117, 123.  
 (*g*) *Kaye v. Dutton*, 7 M. & G. 807.  
 (*h*) *White v. Bluett*, 23 L. J. Ex. 36.  
 (*i*) *Hulse v. Hulse*, 17 C. B. 711; 25  
 L. J. C. P. 177.  
 (*j*) *Cochrane v. Willis*, L. R. 1 Ch.  
 Ap. 58; 35 L. J. C. 36.  
 (*k*) *Lloyd v. Lee*, 1 Str. 94.

the bond of his ancestor in which he was not bound (*a*). A declaration, which alleged, as the consideration for the promise, the forbearance by the plaintiff of a debt, but in which it did not appear that there was any one liable and capable of being sued for the debt, was held bad on demurrer (*b*). A declaration alleged merely a dispute whether the defendant was indebted to the plaintiff, not stating any ground of dispute, and charged, as a consideration for the defendant's promise, that the plaintiff promised not to sue the defendant for the debt in dispute; the declaration was held bad as not showing a sufficient consideration (*c*). Where an action has been commenced, and a promise has been made in consideration of its forbearance, it is presumed against the promiser to have been well founded; "for suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit" (*d*). Therefore, the promiser has to rebut this presumption and show that the consideration was defective by reason of there being no good or doubtful cause of action forborne, in order to discharge himself from the promise.

In the case of *Barber v. Fox* (*e*), the declaration charged a promise by an heir to pay a bond of his ancestor, in consideration of the forbearance of an action brought against the heir upon the bond, but it did not appear in the declaration that the heir was bound by the bond; after verdict for the plaintiff, it was held that the Court could make no intendment to that effect, and, therefore, there appeared to be no cause of action to support the forbearance alleged as the consideration for the promise. In *Wade v. Simeon* (*f*), the declaration charged a contract made upon the consideration that the plaintiff would forbear proceeding in an action which he had then commenced against the defendant, and the plea alleged that the plaintiff never had any cause of action against the defendant in respect of the action in the declaration mentioned, which the plaintiff at the time of the commencement of the action well knew; upon demurrer the plea was held good, Tindal, C. J., saying:—"In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action: and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain; the consideration therefore altogether fails."

The discharge of a prisoner from arrest, where the imprisonment is

(*a*) *Hunt v. Swaine*, 1 Lev. 165; *Barber v. Fox*, 2 Wms. Saund. 136; and see *Tooley v. Windham*, Cro. Eliz. 206.

(*b*) *Jones v. Ashburnham*, 4 East, 455.

(*c*) *Edwards v. Baugh*, 11 M. & W. 641.

(*d*) *Bidwell v. Catton*, Hob. 216; cited per Parke, B., *Smith v. Monteith*, 13 M. & W. 427, 440.

(*e*) 2 Wms. Saund. 136.

(*f*) 2 C. B. 548.



not legal and regular, is not a valid consideration; but an arrest will be presumed lawful and regular until the contrary is proved. Where a person makes a promise in consideration of the release of another from arrest, it is incumbent on him to show that the arrest was illegal, or malicious and without reasonable or probable cause, in order to avoid the promise for want of consideration; in an action upon a promise made upon the consideration of the plaintiff discharging a third party whom he had arrested upon a *capias*, a plea alleging only that the plaintiff had no cause of action against the person arrested, but not stating that the plaintiff knew that fact, was held bad (*a*). A promise to pay the debt of a deceased debtor in consideration of the creditor forbearing to arrest the dead body was held void, because such arrest would have been illegal, and therefore the forbearance of it formed no consideration (*b*).

**Disputed and doubtful rights.**—Where there is some doubt, or dispute, or uncertainty as to a right, the release, or forbearance, or settlement of it may form the matter for a valid consideration. In the case of a tenancy at will, if there be any doubt respecting the term whether it be a tenancy at will or for a certain term, the surrender of the tenancy will form a sufficient consideration (*c*); the release of a prisoner arrested for debt under a writ, which might have been set aside for irregularity, forms a valid consideration (*d*). The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise (*e*).

Forbearing to sue for a claim *bonâ fide* made, respecting which a reasonable doubt exists, although no proceedings have been commenced, is a good consideration (*f*). Where there was a dispute between the parties respecting the balance of mutual accounts, and it was agreed that they should give up their respective claims, and that one should pay the other a sum of money, the agreement was held to contain a sufficient consideration for the promise to pay (*g*).

Where the plaintiff had seized the defendant's goods as a distress for rent, some rent being due, though the amount was disputed, the withdrawal of the distress was held a good consideration for the promise of the defendant to pay a certain sum (*h*). So, where the plaintiffs

(*a*) *Smith v. Monteith*, 13 M. & W. 427; and see *Atkinson v. Bayntun*, 1 Bing. N. C. 444; *Atkinson v. Settree*, Willes, 482; *Herring v. Dorrell*, 8 Dowl. 604.

(*b*) See *Jones v. Ashburnham*, 4 East, 455, 465.

(*c*) *Richardson v. Mellish*, 2 Bing. 229, 244; *Longridge v. Dorville*, 5 B. & A. 117, 123.

(*d*) *Butcher v. Steuart*, 11 M. & W. 357.

(*e*) *Longridge v. Dorville*, 5 B. & Ald. 117; *Haigh v. Brooks*, 10 A. & E. 309, 325, 330; *Orrell v. Coppock*, 26 L. J. C. 269; *Ex p. Lucy*, 4 De G. M. & G. 356; 22 L. J. C. 732.

(*f*) *Cook v. Wright*, 1 B. & S. 559; 30 L. J. Q. B. 321.

(*g*) *Llewellyn v. Llewellyn*, 3 D. & L. 318.

(*h*) *Skeate v. Beale*, 11 A. & E. 983.

had detained the defendant's ship under a claim for a collision which was disputed, the release of the ship was held a good consideration for a promise of the defendant to pay the damages sustained (*a*). The commissioners of excise had made a seizure of spirits belonging to the defendant and had commenced proceedings for their condemnation; the restoration of the spirits and the relinquishment of the suit for condemnation was held to be a good consideration for the payment by the defendants of the value (*b*).

**Equity will not enforce contracts without consideration.**—The Courts of Equity will not grant specific performance of contracts without consideration. In the case of simple contracts, if a consideration be wanting, there is no contract, either at law or in equity; and equity will not supply the defect of the consideration. In the case of contracts under seal, no consideration is necessary to create a binding contract; but if the contract is voluntary and not based on consideration, the Court will not assist it with specific performance; though it will not interpose to set it aside merely on that ground (*c*). By an indenture made with trustees, a father, in consideration of natural love and affection for his daughters, conveyed certain freehold and covenanted to surrender certain copyhold estates to the trustees upon trusts for the benefit of his daughters; the Court decreed the execution of the trusts with regard to the freeholds, because the title of the trustees to the freeholds was complete by the conveyance, but refused to enforce the covenant to surrender the copyholds because it was voluntary (*d*). So with a covenant to transfer stock, if it rests in covenant and is purely voluntary, a court of equity will not execute such voluntary covenant; but if the party has completely transferred the stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced (*e*).

Upon the same principle Courts of Equity will not enforce imperfect gifts: as, a check given gratuitously and not presented before the death of the donor (*f*); an assignment of a bond without consideration (*g*); an assignment of stock or shares by a deed in consideration of natural love and affection and for the benefit of a child, without a legal transfer of the stock (*h*); a voluntary agreement to grant an es-

(*a*) *Longridge v. Dorville*, 5 B. & Ald. 117.

(*b*) *Atlee v. Backhouse*, 3 M. & W. 633.

(*c*) *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 99; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Collinson v. Patrick*, 2 Keen, 123, 134; *M'Fadden v. Jenkyns*, 1 Hare, 458, 461; *Toker v. Toker*, 32 L. J. C. 322, 325.

(*d*) *Jefferys v. Jefferys*, *supra*.

(*e*) *Colman v. Sarrel*, 3 Bro. C. C. 12;

1 Ves. jun. 50; *Ellison v. Ellison*, 6 Ves. 656, 661; 1 White & Tudor, L. C. 2nd ed. 199.

(*f*) *Tate v. Hilbert*, 2 Ves. jun. 111. Whether such check is valid at law against the executor, see *ib*.

(*g*) *Edwards v. Jones*, 1 Myl. & Cr. 226; and see *Tufnell v. Constable*, 8 Sim. 69.

(*h*) *Dillon v. Coppin*, 4 My. & Cr. 647; and see *Antrobus v. Smith*, 12 Ves. 39.

tate made only for the purpose of giving the grantee a qualification for Parliament (a); but where the gift is complete, or the contract executed, a court of equity will not interfere with the transaction merely upon the ground that it was voluntary and without consideration (b). Thus, a purchaser for value of an interest in land cannot require a voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled (c).

The Courts of Equity will not supply a defect in a voluntary appointment in execution of a power, except in favor of a wife or child (d). So, the Courts of Equity will not execute imperfect voluntary declarations of trust (e). But a declaration of trust is considered in a court of equity as equivalent to a transfer of the legal interest in a court of law; and if the transaction by which the trust is created is complete it will not be disturbed for want of consideration (f).

The adequacy of the consideration is not regarded in equity any more than at law; and mere inadequacy of the consideration is not a ground upon which the Courts of Equity will rescind a contract, or even refuse a decree for specific performance (g). But great inadequacy of consideration may afford evidence of fraud or imposition; and upon that ground relief might be granted (h).

## SECTION II.—IMPOSSIBLE CONTRACTS.\*

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*Contract*  
**Impossibility of performing the contract.**—The promise or undertaking expressed in the terms of the agreement may be impossible of performance; and the question may arise as to the effect of such impossibility. The impossibility may be absolute, that is, inherent in the nature of the matter promised, or it may exist only relatively to the ability and peculiar circumstances of the prom-

(a) *Callaghan v. Callaghan*, 8 Cl. & Fin. 374.

(b) *De Hoghton v. Money*, L. Rep. 1 Eq. 154, 158; *Fortescue v. Barnett*, 3 My. & Cr. 36; explained in *Edwards v. Jones*, 1 M. & Cr. 226, 239; *Coleby v. Coleby*, L. Rep. 2 Eq. 803.

(c) *De Hoghton v. Money*, *supra*.

(d) Sugden on Powers, 8th ed. 534.

(e) *Gaskell v. Gaskell*, 2 Y. & J. 502; *Colyear v. Countess Mulgrave*, 2 Keen, 81.

(f) *Collinson v. Pattrick*, 2 Keen, 123,

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134; *M'Fadden v. Jenkyns*, 1 Hare, 458, 1 Phil. 153; *Stapleton v. Stapleton*, 14 Sim. 186.

(g) Story, Eq. Jur. § 244; *Coles v. Trecothick*, 9 Ves. 234, 246; *Griffith v. Spratley*, 1 Cox, 383; *Abbott v. Sworder*, 4 De G. & S. 448; *Harrison v. Guest*, 6 De G. M. & G. 424.

(h) *Id.*; and see *Lowther v. Lowther*, 13 Ves. 95, 103; *Borell v. Dunn*, 2 Hare, 440, 450; *Davies v. Cooper*, 5 M. & Cr. 270; *Cockell v. Taylor*, 15 Beav. 103; *Clark v. Malpas*, 31 Beav. 80.

\* Ch. III, Sect. III, Leake.

iser. The impossibility may be an impossibility of fact, existing in the nature of things; or it may be a legal impossibility, created by law. The impossibility may exist at the time of making the agreement; and in such case it may be known or not known to the parties, or it may be first produced by events subsequent to the agreement. The impossibility of performance may affect the promise, or the consideration for the promise. These variations in the nature and circumstances of the impossibility produce various modifications in the question as to its effect, which require to be severally considered.

**Physical impossibility.**—A thing is absolutely impossible which the laws of nature will not allow to be done: *quod natura fieri non concedit*.

**Practical impossibility.**—What may be called practical impossibility is placed on the same footing in law with absolute impossibility. It has been thus described: "In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it" (a). Whether a promise is reasonable or not, provided it be reasonably practicable, is immaterial. "When a person enters into a contract, he is bound to perform it, whether reasonable or not. An obligation imposed by law is necessarily both reasonable and practicable; but a person may undertake by agreement to do any particular act, and, if it is not reasonable, it is his own fault for entering into such a contract" (b). A promise must, however, be reasonably certain; if the parties have expressed themselves in their agreement in such uncertain terms, that it is impossible to give them any definite meaning, the agreement is necessarily void (c).

**Impossibility by act of God.** The phrase "impossibility arising by the act of God" is used on some occasions as denoting a kind of impossibility having peculiar incidents and consequences (d). Certain accidents as death, tempest, etc., seem to be intended by the phrase. It is obvious, however, that all such accidents are referable to natural and not to supernatural causes, and therefore they are all events, which, though beyond the control, are within the possible contemplation of the parties, and might be and often are provided for in their agreement. The contract of a carrier, by the common law, insures the goods carried,

(a) Per Maule, J., *Moss v. Smith*, 9 C. B. 94, 103; cited by Cresswell, J. O., *W.—v. H—*, 30 L. J. P. & M. 73, 74.

(b) Per Rolfe, B., *Vyse v. Wakefield*, 6 M. & W. 442, 456.

(c) *Guthing v. Lynn*, 2 B. & Ad. 232; per Lord Tenterden, C.J., *Coles v. Hutme*, 3 B. & C. 568, 573; per Alder-

son, B., *Grant v. Maddox*, 15 M. & W. 737, 743; *Alder v. Boyle*, 4 C. B. 635; *Dolling v. Evans*, Weekly Notes, 1867, p. 31.

(d) See Co. Lit. 206 a; *Laughter's case*, 5 Co. Rep. 21 b; Cro. Eliz. 398; *Greningham v. Ewer*, Cro. Eliz. 396; *Williams v. Lloyd*, Sir W. Jones, 179; Chit. Contr. 7th ed. 647.

except against two events—namely the act of God and the king's enemies, “both,” it is said, “so well known to all the country where they happen, that no person would be so rash as to attempt to prove that they had happened when they had not” (a). The specific events, however, excepted from the carrier's insurance as being acts of God, must be ascertained from the decisions respecting them (b).

**Legal impossibility.** An act or undertaking may be absolutely impossible in regard to its legal effect or operation, that is to say, it may import to have or produce a legal effect or operation which the law does not admit of. Impossibility of this kind may be called legal impossibility. It differs from illegality in that it relates only to the legal effect which the act purports to have, and not to the question whether the act itself is allowed or forbidden by law (c).

**Impossibility at time of contracting—known to the parties.** Where an absolute impossibility of performance exists at the time of making the agreement the general rule seems to be that there is no contract. The impossibility may be known or not known to the parties at the time of making the agreement. Where the impossibility is known to the parties at the time of making the agreement, it seems obvious that there can be no intention of performing it on the one side, and no expectation of performance on the other, and therefore the essentials of a valid promise are wanting. The impossible act cannot form the matter for a promise, or for the consideration of a promise (d). A deed of charter-party, containing a covenant that the ship should sail on her voyage on or before the 12th of February, was executed on the 15th of March; it was held that the covenant, being impossible at the time when the deed took effect, became wholly nugatory, and could not be understood as having formed any part of the contract between the parties (e).

**Legal impossibility at time of contracting.** So, where the matter of the agreement is legally impossible, which both parties are presumed in law to know, no valid contract can arise from such agreement. A promise made by the defendant in consideration that the plaintiff who was bailiff to J. S. would discharge the defendant from a debt which he owed to J. S., was held void, because the consideration was impossible; for the plaintiff could not legally discharge a debt due to his master (f). A bond was given conditioned for the payment to the

(a) *Riley v. Horne*, 5 Bing. 217, 220; and see *Coggs v. Bernard*, 1 Smith's L. C. 5th ed. 171; *Forward v. Pittard*, 1 T. R. 27.

(b) See Chitty and Temple on Carriers, 36; Powell on Carriers, 73; and see *Forward v. Pittard*, 1 T. R. 27, 33; *Briddon v. Great Northern Ry. Co.*, 28 L. J. Ex.

51; *Taylor v. Great Northern Ry. Co.*, L. Rep. 1 C. P. 385; 35 L. J. C. P. 210.

(c) See examples of legal impossibility, *infra*.

(d) See *ante*, pp. 2, 3.

(e) *Hall v. Cazenove*, 4 East, 477.

(f) *Harvey v. Gibbons*, 2 Lev. 161.

obligee of a sum of money, upon his procuring subscribers for 9000 shares in a company to be formed for the purpose of taking an assignment of certain patents; the patents, however, contained a proviso that they should be void if assigned to more than five persons; consequently, the condition was impossible in law, and the bond was held to be void (a).

An agreement was made between the plaintiffs and the defendant as follows: in consideration that the plaintiffs, who were assignees of a bankrupt, would forbear to examine the bankrupt touching certain sums he was charged with having received and not accounted for, and that the commissioners of bankruptcy would likewise forbear and desist from taking such examination, the defendant promised the plaintiffs to pay them the sums in question; the contract was held invalid upon grounds stated by Lord Kenyon, C. J., as follows:—"The ground on which I found my judgment is this, that every person who in consideration of some advantage, either to himself or to another, promises a benefit must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law. Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform, because the commissioners had nevertheless a right to examine the bankrupt, and no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them" (b).

**Impossibility at the time of contracting not known to the parties.** Where the parties are in ignorance that the performance agreed upon is impossible, they are under a common mistake as to a matter of fact which induces them to make the contract. In such case the question may arise upon the construction of the terms of the contract whether it has been made expressly or impliedly conditional upon the supposed state of facts, so as not to be applicable to the real state of facts, or whether one of the parties has undertaken the responsibility of performance at all risks and in all events (c).

Thus, upon the sale of a cargo of goods, which at the time of the sale was supposed to be on its voyage, but which unknown to both parties had been then entirely lost, it was held that the contract imported the condition that the ship or goods were then in existence (d). Upon the sale of a ship the vendor covenanted that he had then power to sell the ship; it was held that the covenant was not conditional upon the existence of the ship, and would be broken, if the

(a) *Duvergier v. Fellows*, 5 Bing. 248; affirmed in error, 10 B. & C. 826.

(b) *Nerot v. Wallace*, 3 T. R. 17.

(c) See *post*, p. 589.

(d) *Couturier v. Hastie*, 9 Ex. 102; 5 H. L. C. 673; 25 L. J. Ex. 253.

ship had ceased to exist at the time of the sale although both parties might have been ignorant of it (*a*). So, the sale of a life annuity was held to be conditional upon the annuitant being alive at the time of the sale; and the life having in fact ceased before the contract was made, it was held to be void and the purchase-money recoverable (*b*). The renewal of an insurance of a life was held to be conditional upon the insured being then alive, and he being then dead, though unknown to the parties, it was held void (*c*).

The plaintiff made a charterparty with the defendant, by which it was agreed that the plaintiff's ship should proceed to a port named, or so near thereto as she could safely get, and there load a full cargo with which she was to sail, the cargo to be loaded at the merchant's risk and expense. The ship having received the cargo on board it was found impossible for it when laden to cross the bar of the port, of which neither party were previously aware; the captain thereupon landed part of the cargo and required the defendant to reship it outside the bar, which he refused to do, and the ship sailed with only a part of the cargo; it was held that the plaintiff had no claim for the whole freight, nor for damages from the defendant for refusing to ship a full cargo (*d*). If the plaintiff had been aware that the ship could not cross the bar with the cargo on board, he might have, in the first instance, demanded the cargo to be shipped outside, being as near as the ship could safely get to the port for the purpose of the voyage (*e*).

**Impossibility subsequent to contracting.**—Where the performance of the promise becomes absolutely impossible subsequently to the making of the contract, and there is no express provision in the agreement to meet such an event, the general rule seems to be that the contract remains binding notwithstanding the supervening impossibility. This is a rule of construction founded on the grammatical meaning of the general undertaking contained in the agreement, but it gives way to an implication of a contrary intention. The question whether the contract remains applicable to the subsequent impossibility, or on whom the consequences of such impossibility shall fall, depends upon the intention of the parties, as collected from their agreement. The agreement may show the intention to contract with reference only to a particular state of facts then existing, and not with reference to any different state of facts; or it may show the intention to bind the promiser for the act or performance in all events, or to limit his responsibility to certain events only, and to except others. These

(*a*) *Barr v. Gibson*, 3 M. & W. 390.

(*b*) *Strickland v. Turner*, 7 Ex. 208.

(*c*) *Pritchard v. Merchants' Life Assurance Soc.*, 3 C. B. N. S. 622; 27 L. J. C. P. 169.

(*d*) *General Steam Navigation Co. v. Slipper*, 11 C. B. N. S. 493; 31 L. J. C. P. 185.

(*e*) *Shield v. Wilkins*, 5 Ex. 304.

are questions of construction; and where it cannot be implied that the parties have contemplated and provided for the impossibility arising, the above general rule, founded on the absolute language of the agreement, seems to apply.

Accordingly, it has been frequently laid down to the effect that where there is an absolute contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome, or even impossible (*a*).

In an action on a charterparty (not containing any exceptions), against the master of the ship for not proceeding to the port of loading, the defendant pleaded that it was impossible for him to do so by reason of contrary winds and bad weather; the plea was held bad on demurrer, Lord Mansfield saying that the defendant by the charterparty became the insurer of the risk of his reaching the port of loading (*b*). So, where a shipowner undertakes to take his ship to a certain port or wharf, and is prevented by the state of the tides, the delay is at his cost; and demurrage is not chargeable until the ship reaches the wharf (*c*).

By a charterparty, the freighters contracted to load a full cargo of coals at a certain port in the customary manner; it was held that this meant a loading within a reasonable time according to the usage of the port, and the freighters were not excused by extraordinary casualties, connected with the railway and the collieries, which prevented them procuring the coals for loading; and it was said that the freighters should have protected themselves by some stipulation, if they intended to relieve themselves from the consequences of fortuitous impediments to the due performance of their contract (*d*). A charterer having by charterparty contracted to load a ship with a full cargo of coal with the usual despatch; the term "usual despatch" was held to mean the usual time necessary for a cargo provided ready for loading, and the charterer was not excused because he was prevented from providing a cargo for loading by a severe frost which closed up the access to the colliery by a canal (*e*). But where a charterparty was made of a similar kind for loading coal at a particular colliery, and at the time of making it both parties were aware that the colliery was not at work for want of repairs, but expected it to be at work in a short time, it was held that the freighter was not liable for the delay in loading occasioned by the want of repair of the colliery, and that it

(*a*) 1 Roll. Abr., tit. Condition (G. 1); *Paradine v. Jane*, Aleyn, 27; notes to *Walton v. Waterhouse*, 2 Wms. Saund. 420; *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; *Brown v. Royal Ins. Co.*, 1 E. & E. 853; 28 L. J. Q. B. 275; *Keaton v. Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1.

(*b*) *Shubrick v. Salmond*, 3 Burr. 1637.  
 (*c*) *Parker v. Winlow*, 7 E. & B. 942; 27 L. J. Q. B. 49; *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J. Ex. 413.  
 (*d*) *Adams v. Royal Mail Steam Packet Co.*, 5 C. B. N. S. 492.  
 (*e*) *Keaton v. Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1.



was sufficient if he loaded within a reasonable time after the colliery got to work, the contract having been intended to apply to the known state of things at the colliery at the time (a).

Upon this principle, a lessee of a house who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire (b). On a covenant to build a bridge and to keep it in repair for a certain time the covenantor was held bound to rebuild the bridge, although after the original building it had been destroyed by an extraordinary flood without any default on his part (c). A contract was made to build a bridge on a certain site and maintain it for seven years, and it appeared to be impossible to build a bridge that would stand on that site; the contractor was held liable for damages (d). An insurance company contracted to reinstate a house which had been damaged by fire, and subsequently the commissioners of sewers ordered the house to be taken down as dangerous, from defects not caused by the fire; the company were held bound by their contract notwithstanding, and a plea that the commissioners had caused the house to be pulled down was held bad on demurrer (e). In an action for breach of a promise to marry, the defendant pleaded that after making the promise he became through disease incapable of marriage without danger to his life; but the plea was held no defence to the action (f).

The case of *Lawrence v. Twentiman* (g) has been sometimes cited to the contrary effect; it is reported as follows:—"If a man covenant to build a house before such a day, and the plague appears there before the day and continues until after the day, that will excuse him from the breach of covenant in not doing it before the day, for the law will not compel him to risk his life; but he must do it afterwards." This case has been explained upon the ground that time was not of the essence of the contract, so that it was a contract to build the house within a reasonable time; and it was said that unless it could be so explained, or unless some statute rendered the building illegal by reason of the plague in the neighborhood, the case could not be sustained" (h).

**Contracts conditional upon continued possibility of performance.**—On the other hand, contracts may be made conditional upon the continued possibility of performance. Agreements sometimes

(a) *Harris v. Dreesman*, 23 L. J. Ex. 210.

(b) *Earl of Chesterfield v. Bolton*, Comyns, 627; *Bullock v. Dommitt*, 6 T. R. 650; *Digby v. Atkinson*, 4 Camp. 275; *Re Skingley*, 3 Mac. & G. 221; 20 L. J. C. 142.

(c) *Brecknock Navigation v. Pritchard*, 6 T. R. 750; and see *Dyer*, 33 a (10).

(d) *Errington v. Aynesly*, 2 Bro. C. C. 341.

(e) *Brown v. Royal Ins. Co.*, 1 E. & E. 853; 28 L. J. Q. B. 275; *Erle, J., dissentiente*.

(f) *Hall v. Wright*, E. B. & E. 746, 765; 27 L. J. Q. B. 345; 29 *ib.* 43.

(g) 1 Roll. Abr. p. 450, pl. 10.

(h) See per Lord Campbell, C. J., *Hall v. Wright*, E. B. & E. 746, 762; per Martin, B., *ib.* 790.

occur which are absolute in their terms and contain no express reservation of particular events which may render the performance impossible, but which from their nature sufficiently denote an intention of the parties that they shall apply only to a particular state of things contemplated by the parties, and that they shall not apply in certain events which render the performance impossible; and in such agreements a condition is implied that they shall be void under those circumstances to which they are manifestly not intended to apply (*a*).

Contracts having for object some performance or matter which is strictly personal to the parties are commonly made upon the implied condition that they should be binding only so long as the parties live, though made without any express qualification to that effect; and the death of a party, rendering the object of the contract impossible, at the same time puts an end to the contract (*b*). Thus, a contract to marry is impliedly conditional upon the continued existence of the parties; and the executor of a deceased party acquires no right, and sustains no liability under the contract, even for a breach committed before the death (*c*). Contracts of agency or for personal services are, in general, revoked by death; and the executor of the agent or contractor cannot be sued upon them, except for breaches committed before the death (*d*). A contract made by the plaintiff with a firm consisting of the defendant and his partner, for employment as their agent during four years, was held to be subject to the implied condition that all the parties so long lived, and to be terminated by the death of the defendant's partner (*e*).

Contracts of bailment of goods, as, upon loan, or for work to be done upon them, are commonly made upon the implied condition of the continued existence of the thing delivered; and if the return of the thing becomes impossible because it has perished, without any fault of the bailee, he is excused from the performance of the promise to re-deliver the chattel, according to the maxim, "*res perit domino*" (*f*). The plaintiff delivered a horse to the defendant who promised to re-deliver it on request, and the horse having died before the request, the defendant was held to be excused (*g*).

The plaintiff and the defendant entered into an agreement for giving a series of concerts at a music hall, by which the defendant undertook

(*a*) *Taylor v. Caldwell*, 3 B. & S. 826, 833; 32 L. J. Q. B. 164, 166.

(*b*) 2 Wms. Ex. 5th ed. 1560; *Taylor v. Caldwell*, 3 B. & S. 826, 835; 32 L. J. Q. B. 164, 167.

(*c*) *Chamberlain v. Williamson*, 2 M. & S. 408.

(*d*) 2 Wms. Ex. 5th ed. 1560; per Parke, B., *Siboni v. Kirkman*, 1 M. & W. 418, 423; *Campanari v. Woodburn*, 15 C. B. 400.

(*e*) *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207.

(*f*) *Taylor v. Caldwell*, 3 B. & S. 826, 835; 32 L. J. Q. B. 164, 168; *Williams v. Lloyd*, Sir W. Jones, 179; *Menetone v. Athawes*, 3 Burr. 1592; *Rugg v. Minett*, 11 East, 210; *Bayne v. Walker*, 3 Dow. 233, 238; Jones on Bailments, 119; Story on Bailments, §§ 25, 26, 428, 437.

(*g*) *Williams v. Lloyd*, *supra*.

to provide the hall, and the plaintiff was to provide the rest of the entertainment, but before the time appointed the hall was destroyed by fire; it was held that the contract was conditional upon the existence of the hall, and was put an end to by its destruction, and, therefore, no action would lie against the defendant for not providing the hall (*a*). The plaintiff contracted to erect certain machinery in a building of the defendant, and whilst the works were in progress the building was destroyed by an accidental fire; it was held to be an implied term of the contract on the part of the defendant that the building should continue suitable for the reception of the machinery, which was not excused by the fire, and that he was liable to compensate the plaintiff for the value of the work done (*b*).

Charterparties and contracts for the carriage of goods in ships, being peculiarly liable to be interfered with in their performance by occurrences over which the shipowner has no control, generally contain an exceptive clause guarding him from liability for such occurrences. The common form of this clause runs as follows:—The act of God, the king's enemies, fire, and all and every other dangers, and accidents of the seas, rivers and navigation of what nature and kind soever excepted" (*c*). The contract of carriers within the realm is by common law and without any express stipulation subject to the exception of loss or damage happening by the act of God or the Queen's enemies (*d*). In the lease of a house containing a covenant to repair it is common to except casualties by fire or tempest, in the absence of which exception the lessee would be bound to repair whatever damage happened to the premises by fire or otherwise (*e*).

**Subsequent impossibility caused by the promisee.**—If the promisee has himself caused the impossibility of performance the promiser is excused. "In all cases where a condition of a bond, recognizance, etc., is possible at the time of the making of the condition, and before the same can be performed the condition becomes impossible by the act of the obligee, then the obligation is saved" (*f*). "And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond; for that he himself is the mean that the condition could not be performed" (*g*). By a contract for work it was agreed that the work should be finished by a certain day, and if not, a penalty of so much a day should be paid for each day beyond; the employer was

(*a*) *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164.

(*b*) *Appleby v. Meyers*, 35 L. J. C. P. 295; L. R. 1 C. P. 615.

(*c*) As to this clause see *Russell v. Niemann*, 34 L. J. C. P. 10.

(*d*) See *ante*, p. 98.

(*e*) See *ante*, p. 103.

(*f*) Co. Lit. 206 a.

(*g*) Co. Lit. 206 b.

held not to be entitled to claim the penalty for delay caused by his own interference (a). The promiser is not excused by an impossibility caused by himself (b).

**Subsequent impossibility caused by the law.**—If the supervening impossibility is caused by the law the performance is excused (c). A bond was conditioned that the treasurer of certain turnpike roads should account for and pay all moneys coming to his hands as treasurer according to the direction of the then general turnpike Act; this Act having been subsequently repealed, and the condition as to accounting according to it having thereby become impossible through the act of Legislature, it was held that the condition was saved (d). The Corporation of London, empowered by various Acts of Parliament relating to the River Thames, borrowed money on the security of bonds conditioned for the payment of certain yearly sums out of the tolls and duties granted and made payable by virtue of the said Acts by the Thames Conservancy Act, subsequently passed, all the right of the Corporation under the former Acts as well as the power to receive and apply the tolls above mentioned were taken away from the Corporation and vested in a new body called the Conservators of the Thames; it was held that the performance of the condition having been rendered impossible by the Act of Parliament, the obligation was discharged (e).

Impossibility occasioned by the acts or law of a foreign state does not excuse the performance, unless excepted in the contract. Thus, to an action for not delivering goods sold to be shipped at a foreign port it was held to be no defence that the goods had been confiscated by the foreign government as British property (f). So, it was held no defence to an action on a charterparty for not providing a cargo at a foreign port, that an infectious disorder prevailed there and all intercourse was prohibited by the law of the place; Lord Ellenborough said: "The question here is, on which side the burthen is to fall. If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages" (g).

(a) *Holme v. Guppy*, 3 M. & W. 387;  
*Russell v. Bandiera*, 13 C. B. N. S. 149;  
32 L. J. C. P. 68.

(b) *Bigland v. Skelton*, 12 East, 436;  
*Beswick v. Swindells*, 3 A. & E. 868,  
883.

(c) *Doe v. Rugeley*, 6 Q. B. 107.

(d) *Davis v. Cary*, 15 Q. B. 418.

(e) *Brown v. Mayor of London*, 9 C. B. N. S. 726; 31 L. J. C. P. 280.

(f) *Splidt v. Heath*, 2 Camp. 57 n. (a); and see *Atkinson v. Ritchie*, 10 East, 530.

(g) *Barker v. Hodgson*, 3 M. & S. 267.

In an action by the freighter for not delivering goods under a contract of affreightment whereby the defendant promised to safely carry and deliver the goods of the plaintiff, the act of God, the Queen's enemies, fire, and all dangers of seas, rivers, and navigation excepted, the defendant pleaded that the goods were seized and confiscated in a foreign port as contraband by the law of the foreign country; this plea was held bad on demurrer, the obstacle to performance not coming within any of the matters excepted (*a*). Where a charterparty was made for the carriage of goods from a port of a foreign country (the restraint of princes and rulers excepted), the apprehension of an expected hostile embargo on British shipping in the foreign port was held to be no excuse for the master of the ship leaving the port without the cargo (*b*).

**Impossibility relative to the promiser.** If the act is not absolutely impossible, but impossible only relatively to the power and circumstances of the promiser, such impossibility is, in general, immaterial, and the promiser responsible for the non-performance, whether the impossibility exists at the time of making the contract, or subsequently supervenes. Thus, a person incurring a debt may be, or may become, unable to pay it for want of money; but he is not on that account excused from his contract. "A man may contract to do that which he cannot be sure that he will be able to do; a man may, if he chooses, covenant that it shall rain to-morrow, and if it does not, he has broken his covenant" (*c*). In the old case of *Thornborrow v. Whitaker* (*d*), the contract was, in consideration of £5, of which half-a-crown was paid down and the rest to be paid on performance by the defendant, the defendant promised to deliver to the plaintiff two grains of rye on the following Monday, four grains on the Monday after, and so on, doubling the number every other Monday for a year, and the defendant demurred to the declaration on the ground that the contract was impossible; the Court seemed to think that it was only impossible with respect to the defendant's ability, which was not such an impossibility as would make the contract void, and said that the words "every other Monday" must be construed every next Monday but one, which would bring the contract nearer to the defendant's ability of performance: the counsel for the defendant, perceiving the opinion of the Court to be against his client, offered the plaintiff his half-crown and costs, which was accepted, and so no judgment was given. In the similar old case of *James v. Morgan* (*e*)

(*a*) *Spence v. Chodwick*, 10 Q. B. 517; and see *Storer v. Gordon*, 3 M. & S. 308.

(*b*) *Atkinson v. Ritchie*, 10 East, 530.

(*c*) Per Maule, J., *Canham v. Barry*

15 C. B. 597, 619; 24 L. J. C. P. 100, 106; *Jones v. How*, 9 C. B. 1, 9.

(*d*) 2 L. Raym. 1164.

(*e*) 1 Levinz, 111.

the contract was to pay for a horse a barleycorn a nail, doubling it every nail, which came to 500 quarters of barley, there being thirty-two nails in the shoes of the horse; the judge directed the jury to give the plaintiff the value of the horse in damages, which they did, but on what grounds this direction was given does not appear.

**Undertaking for the act of a third party.** Promises or undertakings for the acts or conduct of a third person which are beyond the control of the promiser, may be impossible of performance relatively to him, but are nevertheless binding; and if there is any default in the act or conduct for which he has undertaken to be responsible, his contract is broken (*a*). In *Lamb's case* (*b*) a bond was conditioned for the obligor to give to the obligee such a release as by the judge of the Prerogative Court should be thought meet, and the judge did not appoint or devise any release; the bond was held to be forfeited, for the obligor was bound to procure the judge to have devised a release. So, a covenant to enfeoff a third person is not discharged by his refusal to accept livery of seisin (*c*). So, a bond or covenant undertaking to pay a sum of money, to be fixed by the valuation of a third person, is not excused by reason of that person refusing to make a valuation (*d*). The defendant, the lessee of a mill, covenanted to leave the millstones in as good condition as he found them, or to pay to the plaintiff so much as they should be damnified, the damage to be estimated by A. and B. who viewed them when the defendant first entered; in an action on the covenant for leaving the millstones damnified, the defendant pleaded that A. and B. had not estimated the damages; the plea was held bad on demurrer, on the ground that it was for the defendant to procure the estimation, otherwise he would be liable for the damages (*e*).

A contract for the sale of a leasehold interest by a lessee, who holds under a lease containing a covenant not to assign without licence of the lessor, is binding, though it cannot be performed without the licence of the lessor; and the vendor is held bound to obtain the licence, although the purchaser, at the time of contracting, had notice of the covenant in the lease (*f*). A contract made by one of the partners in a firm with a stranger to take him into the partnership is binding, although it is impossible for him to perform it without the consent of the other partners (*g*). The defendant who had sold shares in a mining company, which

(*a*) *Doughty v. Neal*, 1 Wms. Saund. 214; *Appleton v. Binks*, 5 East, 148; see *Hughes v. Humphreys*, 6 B. & C. 680, 686; *Tufnell v. Constable*, 7 A. & E. 798.

(*b*) 5 Co. 23 b.

(*c*) Per Lord Kenyon, *Cook v. Jennings*, 7 T. R. 381, 384.

(*d*) *More v. Morecomb*, Cro. Eliz. 864; *Studholme v. Mandell*, 1 L. Raym. 279.

(*e*) *Studholme v. Mandell*, 1 L. Raym. 279; and see *More v. Morecomb*, Cro. Eliz. 864; *Moore*, 645.

(*f*) *Lloyd v. Crispe*, 5 Taunt. 249.

(*g*) *M'Neill v. Reid*, 9 Bing. 68.

could only be transferred with the approval of the directors, was held bound to procure the assent of the directors; and, the directors having refused their assent, he was held liable for a breach of his contract (a).

In the case of a resignation bond given by the incumbent of a living, it was held that the bishop's refusal to accept the resignation was no excuse for the incumbent not resigning; for that he had undertaken to resign, which implies acceptance, without which the resignation is not complete (b). The defendant undertook to pay £35 on an appointed day, or in default thereof to surrender the person of a debtor to the sheriff, and the defendant offered to surrender the debtor, but the sheriff refused to take him; it was held by Parke, B., that the contract was broken, and that the defendant was responsible for the non-surrender (c).

**Impossibility of one of alternative promises.**—If a man binds himself to perform one of two things, of which one is then possible, and the other impossible, he must perform that which is possible (d). Accordingly, where a bond was conditioned to pay to the plaintiff a certain sum on or before the 10th January, or if default should be made in such payment to surrender to the plaintiff a prisoner who had been taken in execution at the plaintiff's suit, and whom the plaintiff had discharged upon procuring the bond as security for his debt, the Court held that the part of the condition which was to render a prisoner in execution who had been once discharged was legally impossible and void, and therefore, as the other part had not been performed, the bond was forfeited (e). So, if an award directs one of two things to be done in the alternative, and either of the two is impossible or uncertain, it is incumbent on the party to perform the other of them (f).

**Subsequent impossibility of one of alternative promises.**—Where one of two alternative promises becomes subsequently impossible, the other may or may not remain binding according to the construction of the contract as to the intention of the parties. It has been attempted to find a general rule to meet such cases, but without a satisfactory result (g); and in the case of *Barkworth v. Young* (h). Kindersley, V. C., after consideration of the authorities, said:—"It appears to me that it is improper to lay down any universal proposi-

(a) *Wilkinson v. Lloyd*, 7 Q. B. 27; and see *Stray v. Russell*, 1 E. & E. 888. 916; 28 L. J. Q. B. 279; 29 *ib.* 115.

(b) *Grey v. Heskeith*, Ambler, 268.

(c) *Stevens v. Webb*, 7 C. & P. 60.

(d) *Da Costa v. Davis*, 1 B. & P. 242.

(e) *Da Costa v. Davis*, 1 B. & P. 242.

(f) *Simmonds v. Swaine*, 1 Taunt. 549.

(g) See *Laughter's case*, 5 Co. 21 b; Cro. Eliz. 398; *Greningham v. Ewer*, Cro. Eliz. 396; *More v. Morecombe*, Cro. Eliz. 864; *Drummond v. Duke of Bolton*, Sayer, 243; and the cases collected in *Jones v. How*, 9 C. B. 1.

(h) 4 Drewry, 1, 25; 26 L. J. C. 153, 165.

tion either way ; but that the principle to be applied in each case is, that it must depend on the intention of the parties to the bond or covenant or agreement, such intention to be collected from the nature and circumstances of the transaction and the terms of the instrument ; and this, at least, I think, will hardly admit of contradiction, that if the Court is satisfied that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of these modes became impossible by the act of God, he is still bound to perform it in the other mode."

In *Laughter's case* (a) a bond was conditioned that if a husband should aliene his wife's land, he would either convey to her land of equal value, or leave her by will an equal sum of money ; the husband aliened the lands and afterwards the wife died, leaving the husband surviving, so that the alternative of leaving the money by will became impossible ; it was held that the condition was not broken : according to the report of Coke the reason of the judgment was "that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." So, the plaintiff, having arrested a debtor at his suit, at request of the defendant released him from custody upon the defendant giving the plaintiff a bond, conditioned to pay the plaintiff £70 before the 25th December or to surrender the debtor before that day into custody in the said action ; in an action on the bond, the defendant pleaded that before the said 25th December the debtor died, and upon demurrer judgment was given for the defendant on the authority of *Laughter's case* (b).

In a subsequent case, however, it was said by the Court that "the rule and reason in *Laughter's case* ought not to be taken so largely as Coke has reported it, but according to the nature of the case ;" and it was stated that the judges who had decided *Laughter's case* had denied that they laid down such a rule as Coke had reported ; yet the whole Court held that the case of *Laughter* was good law (c). So, where A. in consideration of £100 bound himself in a bond conditioned either to make a lease for the life of the obligee before such a day, or to pay him £100, and the obligee died before the day, it was adjudged that the obligor should pay the £100 (d). The plaintiff sued upon a bond,

(a) 5 Co. 21 b.

(b) *Warner v. White*, Sir T. Jones, 95.

(c) See *Studholme v. Mandell*, 1 L. Raym. 279 ; *Drummond v. Duke of Bolton*, Sayer, 243 ; and see per Kindersley,

V.C., *Barkworth v. Young*, 4 Drew. 1, 24 ; 26 L. J. C. 153, 163.

(d) See per Treby, C.J., *Studholme v. Mandell*, 1 L. Raym. 279 ; 1 Salk. 170.



reciting the intended marriage of the plaintiff, and conditioned that defendant should pay to the plaintiff or to her children by her intended husband £3,000 within six months after the defendant should become the Duke of Bolton; the defendant pleaded that the plaintiff's husband died without having any child before the defendant became Duke of Bolton, and relied upon the doctrine laid down by Coke in *Laughter's case*; but the Court denied that doctrine to be law, and held that, construing the condition of the bond according to the intention of the parties, the plea was bad (a).

In the case of *Jones v. How*, a father upon the marriage of his daughter covenanted with her husband by deed or will to give, leave, and bequeath to his daughter an eighth part (that being an equal share with his other children) of all the real and personal estate of which he should die seised or possessed; the daughter died in the lifetime of her father, without issue, and the father did nothing in performance of the covenant; upon a case sent from the Court of Chancery for the opinion of the Court of Common Pleas, the Court certified that there was no cause of action upon the covenant, but assigned no reasons for the certificate (b). In the similar case of *Barkworth v. Young* (c), a father on the marriage of his daughter promised her husband that he would at his death leave to his daughter an equal share of his property with his other children; the daughter died in the lifetime of her father, leaving issue which survived him; the father died having made a will leaving all his property to other children to the exclusion of the daughter; upon a bill claiming the benefit of the promise against the father's estate, the Court treated the promise as an alternative one which was capable of being performed in two ways: either by bequeathing to his daughter by will an equal share, or by dying intestate and leaving her to share equally with his other children under the statute of distributions; by the death of the daughter in the lifetime of her father the latter mode of performing the promise became impossible, but, as she left children who survived her father, it was possible for him to have made a bequest to his daughter by will which by virtue of the 33rd section of the Wills Act, 1 Vict. c. 26, would not have lapsed, but would have taken effect as if the death of the daughter had happened immediately after his death. The Vice-Chancellor Kindersley was of opinion that it was manifestly the intention of the parties that in one way or other the daughter should have an equal share of the testator's property, and if the testator was prevented even by the act of God from performing his obligation in one

(a) *Drummond v. Duke of Bolton*, Sayer, 243.

(b) 9 C. B. 1; Wigram, V.C., con-

firmed the certificate, see S. C. 7 Hare. 267; 19 L. J. C. 324; 9 C. B. 19 (a).

(c) 4 Drew. 1; 26 L. J. C. 153.

way, he was bound to perform it in the other way which was possible, and he decreed accordingly (a).

**Impossibility of alternative promise after election.**—Where the contract is to perform one of two alternatives at the election of one of the parties, and the election is made, the contract becomes single and absolute to perform the alternative chosen; and if, after the election is made, the alternative chosen becomes impossible, the liability of the party bound depends upon the principles already stated respecting subsequent impossibility (b). An insurance company, having insured certain buildings against fire by a policy reserving to them the option either to reinstate the premises injured or to pay the loss, upon a fire happening, chose the former alternative; the buildings were subsequently ordered to be taken down by the public authorities as being in a dangerous condition, but such condition was not caused by the fire; the company were, nevertheless, held bound by the alternative they had chosen, and became liable in an action for not reinstating the premises (c).

**Consideration impossible of performance.**—In contracts containing an executory consideration, or in which a promise is given for a promise, the impossibility of performance may be incident upon the consideration of the contract; and the question will then be as to the effect of the impossibility upon the promise made in respect of such consideration (d).

A promise which, at the time of making it, is void by reason of impossibility of performance cannot form a sufficient consideration for a contract (e).

A promise which is possible and valid at the time of making it would form a sufficient consideration to support a contract, though it might become subsequently impossible. The contract might be made conditional on the continued possibility of performance, and then, upon the event of the impossibility occurring, the contract would be void (f) or the performance of the consideration might be made a condition precedent to the promise made in respect of it, and then the promise would fail by reason of the non-performance of the condition precedent, in the event of such condition becoming impossible of performance.

(a) See the observations of Kindersley, V. C., cited *ante*, p. 109.

(b) See *ante*, p. 101.

(c) *Brown v. Royal Ins. Co.*, 1 E. & B. 853; 28 L. J. Q. B. 275.

(d) See *ante*, p. 4.

(e) *Harvey v. Gibbons*, 2 Lev. 161; *Nerot v. Wallace*, 3 T. R. 17, cited *ante*, p. 100.

(f) See *ante*, p. 103.

### CHAPTER III.

#### OFFER AND ACCEPTANCE.\*

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MARY ANN WILLIAMS *v.* WILLIAM CARWARDINE.

IN THE KING'S BENCH, APRIL 18, 1833.

[*Reported in 4 Barnewall and Adolphus, 621.*]

ASSUMPSIT to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to the discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Park, J., at the last Spring Assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a handbill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine, should, on conviction, receive a reward of 20*l.*; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made, to William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer Assizes, 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23d of

August, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant, to give evidence, the law would not imply a contract by the defendant to pay her the 20%. The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the 20% was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

*Curwood* now moved for a new trial. There was no promise to pay the plaintiff the sum of 20%. That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

*Rule refused.*

## PAYNE v. CAVE.

IN THE KING'S BENCH, MAY 2, 1789.

[*Reported in 3 Term Reports, 143.*]

THIS was an action tried at the Sittings after last Term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff, on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about

to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c., of all which premises the defendant afterwards, to wit, &c., had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale to be performed by the plaintiff as seller, &c., undertook, and then and there promised the plaintiff to perform the conditions of the sale to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale hereinafter mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

*Walton* now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the mean time, the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of *Simon v. Motivos (a)*, which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

(a) 3 Burr. 1921.

THE COURT thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed. *Rule refused.*

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SPENCER AND OTHERS v. HARDING AND OTHERS.

IN THE COMMON PLEAS, JUNE 29, 1870.

[Reported in *Law Reports*, 5 *Common Pleas*, 561.]

THE second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade, a circular in the words and figures following, that is to say, "28 King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1 Milk Street, amounting as per stock-book to 2,503*l.* 13*s.* 1*d.*, and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1 Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our offices on Tuesday morning. Honey, Humphreys, & Co.:" And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular: And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular: And the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf: And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular: And all conditions were performed, &c., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to ac-

cept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, &c.

Demurrer, on the ground that the count showed no promise to accept the plaintiffs' tender or sell them the goods. Joinder.

*Holl*, in support of the demurrer. Although the declaration is somewhat ambiguous, it is evidently intended to raise the question whether one who advertises for tenders for the purchase of goods thereby engages to sell them to the highest bidder. The nearest analogous case is that of an advertisement for tenders for building. It has never been held or suggested that the advertiser is bound to accept the lowest tender. Suppose here there had been only one tender, would the defendants have been bound to accept that? The advertisement clearly does not amount to a contract; it only invites offers.

*Morgan Lloyd*, contra. The words of the circular and the averments in the declaration taken together, disclose a contract on the part of the defendants to sell the goods to whoever should make the highest tender. This is not like the case of tenders for a building. There, the acceptance of the lowest tender is always subject to the architect's judgment as to the character and capacity of the builder. Here, the offer is to sell for cash. The allegation in the count may be sustained either by evidence of a direct promise, or by evidence of the custom of the trade.

[WILLES, J. All the averments are governed by the words, "according to the true intent and meaning of the said circular." It therefore comes round to the question, what is the true meaning of that document.]

The nearest analogy is that of advertisements offering rewards for the discovery and conviction of an offender, of which one of the leading instances is the case of *Williams v. Carwardine* (a), where Littledale, J., says: "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender."

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bid-

(a) 4 B. & Ad. 621, 623. And see *Thatcher v. England*, 3 C. B. 254.

der, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

*Judgment for the defendants.*

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## HARRIS v. NICKERSON.

IN THE QUEEN'S BENCH, APRIL 25, 1873.

[*Reported in Law Reports, 8 Queen's Bench, 286.*]

CASE on appeal from the City of London Court.

The following were the particulars of claim: This action is brought to recover 2*l.* 16*s.* 6*d.* for two days loss of time by the plaintiff, at the special instance and request of the defendant, on the plaintiff attending at a public sale by auction, advertised by the defendant in the London newspapers to be held at the town of Bury St. Edmunds, on the 14th of August, 1872, for the disposal of certain goods and office fittings under bills of sale, and on the faith of which the plaintiff duly attended, and was ready to purchase in pursuance of such request and public notification aforesaid; but the defendant, in breach thereof, did suddenly and without notice withdraw the said goods and



office fittings from the sale, and by which the plaintiff lost not only his two days time and railway fare, but the additional expense of two days board and lodging.

Two days loss of time . . . .	£1	1	0
Third-class railway fare . . . .	0	14	6
Two days board and lodging . . . .	1	1	0
	<hr/>		
	£2	16	6

At the hearing it was proved that the sale was advertised as stated by the plaintiff, and catalogues circulated and distributed. A copy of the catalogue was put in evidence, by which it appeared that "Under bills of sale" certain brewing materials, plant, and office furniture, would be sold by auction by Mr. Nickerson (the defendant), at Bury St. Edmunds, on Monday, 12th of August, 1872, and following days. The conditions were the usual conditions; the first being "The highest bidder to be the buyer."

It was also proved that the plaintiff had a commission to purchase at the sale the "office furniture," advertised to be sold.

The plaintiff went to Bury St. Edmunds and attended the sale, and purchased lots other than those described in the catalogue as "office furniture."

The articles described as "office furniture" were not put up for sale, but were withdrawn.

On these facts the Judge gave judgment for the plaintiff, but at the request of the defendant, gave him leave to appeal.

If the Court was of opinion that the plaintiff was not entitled to recover, the judgment was to be set aside and a nonsuit entered.

*Macrae Moir*, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow v. Harrison* (a); and *Payne v. Cave* (b).

[QUAIN, J. referred to *Mainprice v. Westley* (c)].

*Warton*, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particu-

(a) 1 E. & E. 295, 309; 28 L. J. (Q.B.) 18; 29 L. J. (Q.B.) 14.

(c) 3 T. R. 148.

(b) 6 B. & S. 420; 34 L. J. (Q.B.) 229.

lar person who acts upon it before it has been withdrawn (a). He referred to *Spencer v. Harding* (b).

*Macrae Moir* was not heard in reply.

BLACKBURN, J. I am of opinion that the judge was wrong. The facts were that the defendant advertised bonâ fide that certain things would be sold by auction on the days named, and on the third day a certain class of things, viz., office furniture, without any previous notice of their withdrawal, were not put up. The plaintiff says, inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages from the defendant, on the ground that the advertisement amounted to a contract by the defendant with anybody that should act upon it, that all the things advertised would be actually put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses. As to the cases cited; in the case of *Warlow v. Harrison* (c), the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bonâ fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the minority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable.

QUAIN, J. I am of the same opinion. To uphold the judge's decision it is necessary to go to the extent of saying that when an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. In the present case, it is to be observed that the plaintiff bought some other lots; but it is said he had a commission to buy the furniture, either the whole or in part, and that therefore he has a right of action against the defendant. Such a proposition seems to be destitute of all authority: and it would be introducing an ex-

(a) See *Williams v. Carwardine*, 4 B. & Ad. 621.

(c) 1 E. & E. at pp. 314, 318; 29 L. J. (Q. B.) 14.

(b) Law Rep. 5 C. P. 561.

tremely inconvenient rule of law to say that an auctioneer is bound to give notice of the withdrawal or to be held liable to everybody attending the sale. The case is certainly of the first impression. When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow v. Harrison* (a), that a contract is entered into between the auctioneer and the highest bonâ fide bidder; but that has no application to the present case; here the lots were never put up and no offer was made by the plaintiff nor promise made by the defendant, except by his advertisement that certain goods would be sold. It is impossible to say that that is a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn. *Spencer v. Harding* (b), which was cited by the plaintiff's counsel, as far as it goes, is a direct authority against his proposition.

ARCHIBALD, J. I am of the same opinion. This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to show authority or reason for his proposition. If a false and fraudulent representation had been made out, it would have been quite another matter. But to say that a mere advertisement that certain articles will be sold by auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not take place, is a proposition without authority or ground for supporting it.

*Judgment for the defendant.*

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## WARLOW v. HARRISON.

IN THE QUEEN'S BENCH, NOV. 25, 1858.

[Reported in 1 *Ellis and Ellis*, 295, 309.]

THE declaration stated that the defendant exercised and carried on the trade and business of an auctioneer, and was retained and employed to sell and dispose of, by public auction, divers horses: that he advertised that the said intended sale by auction would take place on Thursday the 24th day of June, 1858, at No. 1 Cheapside, Birmingham, and that there would be sold by auction (amongst other horses) a certain horse, as follows, that is to say, "the property of a gentleman, without reserve, *Janet Pride*, a brown mare, without white, five years old, by *Iago* out of *Stormy Petrel*; for performances see *Racing Calendar*." That the plaintiff attended the said sale by auction, and became and was the highest bidder for the said mare so advertised to be sold without reserve; and that the defendant became and was the agent of the plaintiff, to complete the contract, on behalf of the plaintiff, for

(a) 1 E. & E. at p. 314; 29 L. J. (Q.B.) 14.

(b) Law Rep. 5 C. P. 561.....

the purchase of the said mare, but wholly omitted and refused so to do; whereby the plaintiff was deprived of the benefit of the said contract, and unable to obtain the said mare, as he otherwise would have done, and was put to and incurred divers expenses. And he claimed 150%.

Pleas: 1. Not Guilty; 2. That the defendant was not the highest bidder at the said sale as alleged; 3. That the defendant did not become the plaintiff's agent as alleged.

On the trial, before *Cockburn, C. J.*, at the last Warwick Assizes, the facts appeared to be as follows:

The plaintiff was a captain in the Royal Artillery; and the defendant was a horse-dealer and auctioneer carrying on business in partnership with a Mr. Bretherton, under the firm of *Bretherton and Harrison*, at No. 1 *Cheapside, Birmingham*, where they have a repository for the sale of horses. In June, 1858, the defendant as such auctioneer as aforesaid, with his partner, publicly advertised a sale of horses, to take place by auction, at their repository, on Thursday, 24th June, and issued printed particulars of such sale, which, so far as relates to this case, were as follows:

"The three following horses, the property of a gentleman, without reserve; in stall 23, *Moire Antique*; stall 24, *Janet Pride*, a brown mare without white, five years old, by *Iago* out of *Stormy Petrel*; for performances see Racing Calendar; stall 25, Captain Barclay," &c.

In consequence of these advertisements the plaintiff, on 23d June, sent his groom and Mr. Stanley, a veterinary surgeon, to the defendant's repository, to examine and report to him respecting the horses so advertised for sale there, who reported the mare as worth probably from 40*l.* to 60*l.*: and, on receiving Mr. Stanley's report of the mare *Janet Pride*, for which examination and report the plaintiff paid Mr. Stanley his charge of 10*s.*, the plaintiff next day with one of his friends, attended at the sale by auction, at the defendant's repository; where, after the preceding lots had been disposed of, the mare *Janet Pride* was put up for sale by the defendant as auctioneer. And, after several biddings made for her, some being made on behalf of the plaintiff by a friend of his, the mare went up to 59 guineas: the plaintiff then bid 60 guineas for her; and immediately there was a bid made over him of 61 guineas, by Mr. Henderson, the owner of the mare. The defendant, on the 61 guineas being so bid as aforesaid, nodded to the plaintiff, to see if he would bid any more: but the plaintiff, having been then informed that the owner of the mare had made the last bidding of 61 guineas, shook his head and refused to make any further bid; and the defendant thereupon knocked down the mare to Mr. Henderson, the owner, for 61 guineas, and entered his name as purchaser in the sale book, which had been prepared before the sale, and which contained the names of the horses to be sold at the sale, and the names of the

proprietors. The mare was sent back to the stables; and defendant went on selling other lots. The plaintiff went at once into the auctioneer's office. He there saw Mr. Bretherton, defendant's partner, and Henderson the owner, and claimed the mare, as the highest bonâ fide bidder for her, and as she had been advertised in the printed bills for unreserved sale. In the course of the conversation with Mr. Bretherton, Mr. Henderson said; "I bought her in; and you shall not have her; I gave one hundred and thirty pounds for the mare; and it is not likely I am going to sell her for sixty three." The same day, plaintiff tendered to the defendant the sum of 63 pounds in sovereigns as and for the price of the mare, and demanded her; the defendant refused to receive the money or to deliver up the mare to the plaintiff, stating, at the same time, that he had knocked her down to the highest bidder, and he could not interfere in the matter. He also said Henderson was the highest bidder. There was evidence that certain printed conditions of sale were posted about the defendant's repository where the sale took place, and that it was the practice to read them before the sales there. A copy of these conditions, so far as relates to this case, is as follows:

*"Conditions of Sale.*

"1. The highest bidder to be the buyer; and, if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser."

"3. The purchaser, being declared, must immediately give in his name and address, with (if required) a deposit of 5s. in the pound on account of his purchase, and pay the remainder before such lot or lots are delivered."

"8. Any lot ordered for this sale, and sold by private contract by the owner, or advertised without reserve and bought by the owner, to be liable to the usual commission of 5 per cent."

A verdict was taken for the plaintiff, Damages 5*l.* 5*s.*; and leave was given to the plaintiff to amend the declaration if the Court should think fit; and to the defendant leave was given to move as after mentioned.

*Mellor*, in this term, obtained a rule to enter a verdict for defendant, or a nonsuit, on the grounds: First, that no such duty as alleged devolved upon the defendant under the circumstances of the case; secondly, that the defendant was not the agent of the plaintiff to complete the sale, not being bound by any duty or contract so to do; thirdly, that there was no contract with the plaintiff in point of fact which it became the duty of the defendant to complete; fourthly, that, by the bidding of the owner of the horse of a larger sum than that bid by the plaintiff, any authority on the part of the owner to sell the horse to

the plaintiff was revoked; fifthly, that it was the duty of the plaintiff, if he disputed the bid of the owner of the horse, to have disputed such bidding pursuant to the conditions upon which the sale was to be conducted.

On a former day in this term (a).

*Isaac Spooner and Beasley* showed cause. First, the bidding by the owner of the horse was, in law, fraudulent, and not a bidding at all; *Bexwell v. Christie* (b); and in *Sugden's Practical Treatise on the Law of Vendors and Purchasers*, vol. i. p. 13 (11th ed.), this case is introduced by a reference to *Cicero's* view of the immorality of employing a sham bidder (c), and to *Huber's* doctrine that, if a vendor employ a puffer, he shall be compelled to sell the estate to the highest bonâ fide bidder (d). The plaintiff was therefore really the highest bidder. *Bexwell v. Christie* (e) has been much canvassed, especially in equity. It was there decided that no action lay against an auctioneer, at the suit of the vendor who employed him, for selling to the highest bidder, contrary to the directions of the plaintiff, who had ordered the auctioneer not to sell at a price below a sum privately named by the vendor to the auctioneer. The vendor may, as it was there said, fairly set up the article at a price named, or may give a notice that he means to bid once himself. If, in the present case, after the owner had made the bidding, a third party had bid still higher, had been declared purchaser, and had refused to complete the purchase, the owner could not have compelled him to do so, the highest bidding having been produced by the fraudulent bidding of the owner. That appears from *Howard v. Castle* (f), where *Bexwell v. Christie* (e), was treated as a conclusive authority. *Crouder v. Austin* (g), and *Wheeler v. Collier* (h) are to the same effect: and in *Thornett v. Haines* (i) the Court of Exchequer decided that this was the law, at any rate, where more than one puffer had been employed, or where, as here, the sale is announced to be without reserve. The principle, that the bid of a puffer does not prevent the previous highest bidder from being still the highest, and that the bidding by the puffer is illegal, and precludes the vendor from insisting on biddings enhanced by such practice, will be found to have been acted upon in two Scotch cases, *Grey v. Stewart* (j) and *Anderson*

(a) November 24th. Before Lord Campbell C. J., Wightman and Erle Js.

(b) 1 Cowp. 395.

(c) "Dolus autem malus simulatione, ut ait Aquilius, continetur. Tollendum est igitur ex rebus contrahendis omne mendacium: non licitorem venditor, nec qui contra se liceatur emptor, apponet." *De Off.* iii. 15. 61.

(d) *Prælectiones*, lib. xviii. tit. 2. s. 7. "Hoc facile constabit, si venditor falsum emptorem indè ab initio subornet, qui plus aliis offerat, ut veris emptoribus

præmium maximæ licitationis, vulgò *Struyckgelt*, quo nil usitatus, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia hoc est contra fidem conventionis perfectæ, quâ statutum est, ut maximo licitatori præmium daretur."

(e) 1 Cowp. 395.

(f) 6 T. R. 642.

(g) 3 Bing. 368.

(h) Moo. & M. 123.

(i) 15 M. & W. 367.

(j) Decisions of the Court of Session, from the beginning of February, 1752, to the end of the year 1756; p. 130 (7th August, 1753).

v. *Stewart* (a). In the last mentioned case *Bexwell v. Christie* (b) and *Howard v. Castle* (c) were cited. Lord Cottenham, C., in *Robinson v. Wall* (d), held that a sale, where the highest bidding was produced by the employment of a party privately employed by the vendor, the sale having been advertised as "without reserve," could not be enforced in equity. Next, the auctioneer was, for the purpose of completing the purchase, the agent of the plaintiff; and, that being so, it was his duty to knock down the article to the plaintiff, who was the highest legal bidder. The auctioneer is, it is true, in the first instance the agent of the seller who instructs him: but he contracts also a duty towards every one from whom he receives a bidding. [Lord Campbell, C. J. When do you say that agency begins?] As soon as the bidding is made. In *Jones v. Nanney* (e), where an auctioneer attempted to recover, in alleged pursuance of the conditions of sale, the auction duty from a bidder, to whom the article had been knocked down, but whose name had not been entered in writing by the auctioneer, and it was held that the action did not lie because the conditions of sale made the duty payable by the purchaser, which the defendant was not, Alexander, C. B. said that the conditions of sale formed the written contract between the parties. If an auctioneer improperly rescind a contract, he is liable to the vendor as for breach of the duty which he has contracted to perform; *Nelson v. Aldridge* (f). [Lord Campbell, C. J. Your difficulty will be to show such a contract between the auctioneer and the bidder.] The language of Best, J. there seems to apply to both cases: "It was the duty of the auctioneer to sell and not to rescind, to do, not to undo; and the law would imply a contract on his part to discharge his duty." Instructions given privately by the seller to the auctioneer, interfering with the professed competition, are a fraud on the public, and so is a compliance with such instructions. [Lord Campbell, C. J. A man who commits a breach of a public duty, whereby an individual is damaged, is liable to an action at the suit of the individual: but it is difficult to say that an auctioneer has a public duty to perform, within the meaning of that rule.] A sale by auction is not like other sales: a material difference is made by the public announcement. This is what makes the auctioneer the agent of the bidder. [Lord Campbell, C. J. You say that the auctioneer, in consideration of a person bidding, undertakes to make him the purchaser if the bid is the highest.] That is so. The bidder, after the hammer is down, cannot retract his bidding, though his name has not been entered: he may retract before the hammer is down; which is all that *Payne v. Cave* (g) shows, though some remarks of the Court

(a) Decisions of the First and Second Divisions of the Court of Session, from November, 1814 to November, 1815, p. 108 (December 16, 1814).

(b) 1 Cowp. 395.

(c) 6 T. R. 642.

(d) 2 Phill. Rep. Ca. Ch. 372.

(e) 13 Price, 76; S. C. M'Clel. 25.

(f) 2 Stark, 435.

(g) 3 T. R. 148.

are reported in that case the accuracy of which may be questionable. In *Emmerson v. Heelis* (a) it was laid down that the auctioneer is the agent of the buyer, and that the authority is conferred by the buyer bidding aloud. That decision was acted upon in *White v. Proctor* (b). And in *Kemey's v. Proctor* (c) specific performance was decreed against a purchaser on the ground that the auctioneer had written down his name, and was his agent: there Grant, M. R. decided in conformity with the decisions before mentioned, though indeed, it seems, reluctantly. The same doctrine was explicitly laid down by Bailey, J. in *Kemworthy v. Schofield* (d). *Buckmaster v. Harrop* (e) and *Hinde v. Whitehouse* (f) are also recognitions of it. In the *Earl of Glengal v. Barnard* (g) Lord Langdale, M. R. appears to assent to it, on the ground of the peculiar "nature of the proceeding by auction." In his judgment reference is made to *Stansfield v. Johnson* (h) and *Walker v. Constable* (i), cases in which the doctrine was held not to apply to the sale of lands (so as to satisfy sec. 4 of the Statute of Frauds 29 C. 2. c. 3) but which are now not considered to be law. It has been suggested that the auctioneer's authority as agent was revoked by the owner himself bidding; but there is nothing to support such a doctrine. [Wightman, J. The revocation, if it was one, did not take place till after the plaintiff had made his bidding.] Lastly, on the evidence, there is ground for believing that the defendant knew that the highest bidding was made on behalf of the owner himself.

*Mellor and Field*, contra. It is not necessary, on behalf of the present defendant, to dispute the proposition that, on the facts of this case, the vendee might have resisted any attempt by the vendor to enforce the sale, supposing the vendee had bidden a higher price than that bidden by the vendor. In Sugden's Concise and Practical Treatise of the Law of Vendors and Purchasers of Estates, pp. 8, 9 (ed. 1857), most of the cases cited for the plaintiff are collected; but they are there brought forward for the purpose only of that question. And this is all that the decisions on the subject of puffing prove; they show that a bidder, whose bid has been produced by puffing, cannot be held to his bid. But here the question is whether the auctioneer can be made liable to the bidder whom he has not declared purchaser. The argument on the other side assumes that the bidding by the owner took place in pursuance of an agreement between the owner and the auctioneer; whereas it does not appear that the auctioneer knew that the owner was a bidder at all. Nor is it true, as a general proposition, that the auctioneer is, *ex vi termini*, agent for both parties: that depends upon the facts of the particular case; per Lord Denman, C. J. in *Bartlett v. Purnell* (j). [Lord Campbell, C. J. Clearly the auctioneer

(a) 2 Taun. 38. (b) 4 Taun. 209. (c) 3 V. & B. 57. (d) 2 B. & C. 945.  
 (e) 13 Ves. 456. (f) 7 East, 558. (g) 1 Keen, 769, 788. (h) 1 Esp. 101.  
 (i) 1 B. & P. 306. S. C. at N. P., 2 Esp. 659. (j) 4 A. & E. 792.



is the agent of the vendor; and he is the agent of the vendee at least for the purpose of taking down the name at the bidding.] His agency to the vendor is created by the direction which he receives to sell according to the instructions given to him: and, when the bidder makes a bid, that is an authority to knock the article down to the bidder; after which the auctioneer, in writing down the bidder's name, no doubt acts as agent to both parties, so as to satisfy the Statute of Frauds. But the auctioneer does not become the agent to the auctioneer by the mere bidding: only, if he accepts and acts upon the authority by knocking down the article and writing the name, he then is agent. But, before such acceptance, he has not contracted with the bidder to act as agent: that, however, is the proposition necessary to support the allegation in the declaration. The mere offer to sell, or the mere offer to buy, constitutes no contract. Suppose a bid for 4*l.* and then another bid for 5*l.*, at which the article is knocked down, but which turns out to be improper: is that a sale for the 4*l.*? The time at which the agency arises is defined by Sir James Mansfield's explanation of the auctioneer's authority, in *Emmerson v. Heelis* (a). By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser." The bidder might have constituted, as his agent, another person, independent of the auctioneer, as, in *Bird v. Boulter* (b), the auctioneer's clerk. In the case of brokers' notes, the broker has the authority of both vendor and vendee, of the one to sell and of the other to buy. *Bexwell v. Christie* (c) shows merely that the owner cannot sue the auctioneer for disobeying legal instructions. *Payne v. Cave* (d) shows that, till the hammer is down, the contract between the owner and the bidder is not complete: how then can there be, before that, a contract between the bidder and the auctioneer? So the authority of a broker to insure may be revoked at any time before the policy is subscribed; *Warwick v. Slade* (e). So a parol contract of sale of goods for a sum exceeding 10*l.* may be revoked at any time before there is a signed written memorandum; *Taylor v. Wakefield* (f). And the general law of England is that an offer may be retracted before it is accepted; *Routledge v. Grant* (g). And this shows that, if the bid of the owner here invalidated the transaction, there was a revocation of the authority before the contract was completed. And, if the auctioneer had afterwards professed to sell, it would not have passed the property. Is the

(a) 2 Taun. 48.

(b) 4 B. &amp; Ad. 443.

(c) 1 Cowp. 395.

(d) 3 T. R. 148.

(e) 3 Campb. 127.

(f) 6 E. &amp; B. 765.

(g) 4 Bing. 653.

auctioneer agent for every person in the saleroom before a bid has been made? [Erle, J. It has been held that, where a party offers publicly a reward for any one who will do a particular act, and somebody does the act in consequence, the party offering the reward has contracted with him who does the act.] That seems to have been decided in *Williams v. Carwardine* (a), a case which was much discussed in *Gerhard v. Bates* (b), where the Court said that such cases were "somewhat anomalous."

*Cur. adv. vult.*

LORD CAMPBELL, C. J., now delivered the judgment of the court.

In this case, which was very learnedly and ably argued before us yesterday, we feel bound to give judgment for the defendant, on the short ground that the plaintiff's allegations as to the agency of the defendant and the duty of the defendant to complete the contract on behalf of the plaintiff are not substantiated.

The plaintiff's counsel argued that, as soon as the plaintiff had bid for the mare, the defendant, as auctioneer, became his agent to complete the contract for the purchase, and that the defendant was guilty of a breach of duty in failing to do so. This ingenious reasoning rests entirely upon the decision that, if, after an article put up to be sold by auction is knocked down to the highest bidder, the auctioneer, at his request, signs a memorandum of the agreement to purchase, this is a sufficient memorandum of the agreement to bind the purchaser. But the auctioneer is the agent of the purchaser for this purpose only; and he becomes so only when there is a contract of sale by the acceptance of the bidding, which is usually declared when the hammer is knocked down. Then the purchaser, or his representative, being present, authorizes the auctioneer to sign the memorandum. But, till the hammer goes down, the auctioneer is exclusively the agent of the vendor. Mr. Spooner contended that from the commencement of a sale by auction the auctioneer is in the situation of a broker or middleman between the vendor and the purchasers, as the common agent of both; that he is the agent of the bidder to receive the bidding; that the bidder is a conditional purchaser; that, where the sale by the conditions is without reserve, the bidder is absolutely the purchaser unless there be a *bonâ fide* higher bidding; and that the auctioneer, in consideration of the bidding by which commission will come to him, promises the highest bidder to knock down the article to him, and to do all that is necessary to complete the sale. But this reasoning is wholly at variance with the case of *Payne v. Cave* (c), which has been considered good law for nearly seventy years. That case decided that a bidding at an auction, instead of be-

(a) 4 B. & Ad. 621.

(b) 2 E. & B. 476. See *Denton v. Great*

*Northern Railway Company*, 5 E. & B. 860.

(c) 3 T. R. 148.

ing a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that the assent is signified by knocking down the hammer; and that, till then, either party may retract. This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder being respectively free till the hammer is knocked down, the auctioneer cannot possibly be previously bound. At this auction, the mare never was knocked down to the plaintiff; and the relation of principal and agent between him and the defendant never had commenced.

We are not called upon to say whether there is any or what remedy on the conditions of sale against the vendor who violates the condition that the article shall be *bonâ fide* sold without reserve; but we are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down.

We are therefore relieved from the necessity of commenting upon any other of the numerous authorities cited on both sides: and we must make absolute the rule which gives the plaintiff the choice of a nonsuit or of a verdict being entered for the defendant.

*Nonsuit entered.*

## WARLOW v. HARRISON.

IN THE EXCHEQUER CHAMBER, NOV. 26, 1859.

THE plaintiff appealed against the above decision.

The case was argued in Easter Vacation, 1859 (*a*), and Trinity Vacation, 1859 (*b*).

*Macaulay* for the appellant (plaintiff below). There was in this case a breach of duty by the auctioneer, giving to the plaintiff a right of action. The sale was "without reserve:" under such circumstances, unless public notice is given, a bidding by the owner is fraudulent; *Thornett v. Haines* (*c*), *Robinson v. Wall* (*d*). The principle that the owner is not to mislead the public in this respect was laid down in *Bexwell v. Christie* (*e*). It has been suggested that the bidding by the owner was a countermand of the authority to sell; but the defendant did not so treat it; he treated it as an ordinary bidding.

(*a*) May 14th. Before Willes and Byles Js., and Martin, Bramwell and Watson Bs.

(*b*) June 20th. Before the same Judges. Williams J. was also present on this day,

when the conclusion of the argument for the defendant and the reply for the plaintiff were heard.

(*c*) 15 M. & W. 367.

(*d*) 2 Phill. Rep. Ca. Ch. 372.

(*e*) 1 Cowp. 395.

According to *Bexwell v. Christie* (a) the auctioneer might, after the bidding by the owner, have sold to the plaintiff on his first bidding: how then can the auctioneer's authority have been countermanded? [Martin, B. Supposing your general principle true, was not the proper remedy here an action for deceit?] There is a contract between the auctioneer and the bidder. [Martin, B. Does the auctioneer do more than say that the owner has directed him to sell without reserve?] He professes to have adopted those directions. [Martin, B. Why could not the owner stop the sale?] He might do so, but not by such a trick as this. There can be no dispute but that, if the article is once knocked down to a bonâ fide bidder, the auctioneer is his agent. But, when the sale is "without reserve," the agency commences at the bidding, which gives the bidder a right till divested by a higher bonâ fide bidder. The auctioneer is thus, successively, the agent of every bidder, conditionally upon there being no higher bonâ fide bidding. [Martin, B. The case does not show that the defendant knew that it was the owner who was bidding: how is he then to blame?] The Court below relied upon *Payne v. Cave* (b). But there it was not part of the conditions of sale that the bidding should be "without reserve:" and the bidder had therefore a discretion to withdraw his bidding at any time before the hammer was down: had the sale been "without reserve" he would have been bound by his bidding. The consideration on which the auctioneer enters into the contract is the increase of commission which will accrue to him from each successive bidding.

*Field*, contra. The declaration alleges that the defendant was retained and employed to sell; that is, by the owner: and then it alleges that the defendant became the agent of the plaintiff, the bidder, to complete the sale. On that agency the declaration, which complains of a breach of duty, is founded. But at what time did such agency commence? All that the defendant has done, in the way of undertaking on his part, is to publish an announcement that he is employed by the owner to sell. That this created no contract with the plaintiff is plain from *Payne v. Cave* (b) and *Cooke v. Oxley* (c). In *Chitty's Treatise on the Law of Contracts*, p. 9, (ed. 6), it is said: "In order, then, that a simple contract may be binding, there must first be a definitive promise by the party charged, accepted by the person claiming the benefit of such promise." Now, according to *Payne v. Cave* (b), there was in this case no such acceptance, nothing has passed since the offer of the plaintiff. [Byles J. May it not be said that the advertisement of the defendant amounted to a promise that he would act in compliance with the terms of the advertisement towards any one who also acted on those terms?] *Jones v. Nanney* (d)

(a) 1 Cowp. 395. (b) 3 T. R. 148. (c) 3 T. R. 653. (d) 13 Price, 76; S. C. M'Lel. 25.

shows that here the plaintiff would not have been liable to the defendant: and, according to *Warwick v. Slade* (a), nothing had passed which made the authority given by the owner to the defendant irrevocable. *Farmer v. Robinson* (b) shows the same. [Willes, J. Has it not been decided that, where a carrier has advertised that his carriage will start at a certain time, he is, in the event of the carriage starting too late, liable to every one who acts on the faith of the advertisement?] The case alluded to seems to be *Denton v. Great Northern Railway Company* (c). But the complaint there was that the train of the defendants did not fall in with another train, as promised by the time-table. And it appears that there the plaintiff had actually commenced his journey by the defendants' train; and he therefore must have taken a ticket and paid the money; the contract was therefore complete. The doctrine that, in general, any one who makes a general offer contracts personally with each individual who accepts it, can scarcely be relied upon after the remarks of the Court in *Gerhard v. Bates* (d). The words in the advertisement "without reserve" cannot affect the question as suggested on the other side. Those words might have disqualified the owner from availing himself, directly or indirectly, of his own bid: but how can they make the auctioneer the agent of the bidder? [Macaulay. According to the terms of the reservation, the declaration may be altered], but it has not been altered; and the breach complained of is the neglect of duty as agent. Nor, if the action were shaped as an action for fraud, would the evidence support it: there is no proof that the defendant knew that the owner was bidding, the defendant therefore cannot be made in any way liable for the evasion of the terms of the proposed sale. This distinction becomes very important with reference to *Gerhard v. Bates* (a). After the owner had bid, nothing which the defendant could have done would have bound the property. [Byles, J. No doubt an offer may be retracted before it is accepted: but, if you offer to sell "without reserve," is not the bidding an acceptance?] It cannot be so; for it is undoubted law that the bidder may retract before the hammer is down. Till then, the auctioneer cannot bind the bidder according to the rule in *Simon v. Motivos* (e) and other authorities already cited.

*Macaulay* in reply. According to the facts stated, the defendant must be liable in some form or other. [Willes, J. On this appeal, we are to see what part of the declaration is not proved. Bramwell, B. The defendant says that it is not proved that he was plaintiff's agent. Willes, J. Perhaps it may be said that this is only alleged as a conclusion in law. Watson, B. On the view, the traverse taken

(a) 3 Camp. 127. (b) Note to *Heyman v. Neale*, 2 Camp. 339. (c) 5 E. & B. 860.  
 (d) 2 E. & B. 476. (e) 3 Bur. 1921.

is not material.] "If the facts stated raise the duty, then the express allegation of the duty is unnecessary; if they do not, then the express allegation will not supply the defect;" per Lord Campbell, C. J. in *Seymour v. Maddox* (a). As to the effect of the words "without reserve," *Robinson v. Wall* (b) and *Thornett v. Haines* (c) are conclusive. The notion of a revocation of authority, after a bidding made upon an announcement that the sale was to be without reserve, cannot be supported. [Bramwell, B. If there were such a revocation, perhaps the auctioneer should have said: "Stop: the sale is not without reserve; my authority is revoked."]

*Martin, B.* The Court will take time for considering: in the meanwhile, the parties may consider whether the proper end of this case would not be a *stet* processus.

*Cur. adv. vult.*

MARTIN, B., now delivered the judgment of the Court.

This is to be understood as the judgment of my brothers Byles and Watson and myself.

This is an appeal from a judgment of the Court of Queen's Bench, reported in 28 *Law Journal*, Q. B. 18. The material facts stated in the case are these:

The defendant and a Mr. Bretherton are auctioneers in partnership at *Birmingham*, where they have a repository for the sale of horses. In June, 1858, they advertised a sale by auction at the repository. The advertisement contained, amongst other entries of horses to be sold, as follows: "The three following horses, the property of a gentleman, *without reserve*." One of these was a mare called *Janet Pride*. The plaintiff attended the sale, and bid sixty guineas for her: another person immediately bid sixty-one guineas; this person was Mr. Henderson, the owner of the mare. The plaintiff, having been informed that the last bidder was the owner, declined to bid further; and thereupon the defendant knocked down the mare to Mr. Henderson for sixty-one guineas, and entered his name as purchaser in the sale book, which contained the names of the animals to be sold at the sale, and the names of the proprietors. The plaintiff went at once into the auctioneer's office and saw Mr. Bretherton and Mr. Henderson, and claimed the mare from Mr. Bretherton as being the highest *bonâ fide* bidder, the mare being advertised to be sold without reserve. Mr. Henderson said, "I bought her in; and you shall not have her: I gave one hundred and thirty pounds for the mare; and it is not likely I am going to sell her for sixty-three." On the same day, the plaintiff tendered to the defendant sixty-three

(a) 16 Q. B. 326, 329, 330. (b) 2 Phill. Rep. Ca. Ch. 372. (c) 15 M. & W. 367.

pounds, in sovereigns, as the price of the mare, and demanded her. The defendant refused to receive the money or deliver the mare, stating that he had knocked her down to the highest bidder, and he could not interfere in the matter. There was evidence that the plaintiff had notice that the following were amongst the conditions of sale.

"1. The highest bidder to be the buyer ; and, if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser."

"3. The purchaser, being declared, must immediately give in his name and address, with (if required) a deposit of five shillings in the pound on account of his purchase, and pay the remainder before such lot or lots are delivered."

"8. Any lot ordered for this sale, and sold by private contract by the owner, or advertised without reserve and bought by the owner, to be liable to the usual commission of 5 per cent."

At the trial a verdict was entered for the plaintiff for £5. 5s damages ; and leave was given to amend the declaration if the Court should think fit. Leave was also given to the defendant to move to enter a nonsuit. The Court of Queen's Bench made a rule absolute to enter a nonsuit ; and this is an appeal from their judgment.

Upon the pleadings as they stand we think the judgment of the Court of Queen's Bench is right, and that the defendant is entitled to the verdict upon the issue on the third plea ; but there is power given to the Court to amend ; and it has been held that this power extends to the Court of Appeal ; and we think we ought to exercise it largely to carry out the object of the Common Law Procedure Acts 1852, and 1854, viz. to determine the real question in controversy between the parties in the existing suit. Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In a sale by auction there are three parties, viz. the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed : he was a concealed principal. The name of the auctioneers of whom the defendant was one, alone was published : and the sale was announced by them to be "without reserve." This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not ; *Thornett v. Haines* (a).

We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him; *Denton v. Great Northern Railway Company (a)*. Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of the Statute of Frauds, which relates only to direct sales, and not to contracts relating to or connected with them. Neither does it seem to us material whether the owner, or person on his behalf, bid with the knowledge or privity of the auctioneer. We think that the auctioneer has contracted that the sale shall be without reserve; and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down; in either case the sale is not "without reserve," and the contract of the auctioneer is broken. We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority: but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified.

We do not think the conditions of sale stated in the case (assuming the plaintiff to be taken to have had notice of them) affect it. As to the first, Mr. Henderson could not be the buyer: he was the owner; and, if it were material, there is ample evidence that the defendant knew him to be so; indeed we think he ought not to have taken his bid, but to have refused it; stating, as his reason, that the sale was "without reserve." We feel inclined to differ with the view of the Court of Queen's Bench in this, that we rather think the bid of Mr. Henderson was not a revocation of the defendant's authority as auctioneer. The third condition has nothing to do with the case; and the eighth only provides that, if, upon a sale without reserve,

(a) 5 E. & B. 860.



the owner act contrary to the conditions, he must pay the usual commission to the auctioneer. For these reasons, if the plaintiff think fit to amend his declaration, he, in our opinion, is entitled to the judgment of the Court.

WILLES J. My brother Bramwell and myself do not dissent from the judgment which has been pronounced. But we prefer to rest our decision, as to the amendment, upon the ground that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve. The result is the same.

Judgment of Court of Queen's Bench to be affirmed; unless the parties elect to enter a *stet processus*, or the plaintiff amend his declaration; in which latter case, a new trial to be had.

*Field* applied for costs in case the amendment were made.

*Per Curiam.* The circumstances are such that we think the plaintiff ought to be at liberty to amend without costs. If the defendant desires it, we will make them generally costs in the cause.

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*In re* AGRA AND MASTERMAN'S BANK.

*Ex parte* ASIATIC BANKING CORPORATION.

IN CHANCERY, JAN. 31 AND FEB. 11, 1867.

[ *Reported in Law Reports, 2 Chancery Appeals, 391.* ]

THIS was an appeal by the official liquidator of the Asiatic Banking Corporation from an order of Vice-Chancellor Wood, refusing to admit a claim made against the estate of the *Agra and Masterman's Bank, Limited*, in respect of certain bills of exchange.

On the 31st of October, 1865, *Agra and Masterman's Bank* gave to *Dickson, Tatham & Co.*, a letter of credit, addressed to them, which was in the following terms :—

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honor on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865."

In May, 1866, *Dickson, Tatham, & Co.*, drew bills on the *Agra and Masterman's Bank*, under this letter, for £6000, and sold them to the agent of the Asiatic Banking Corporation. The agent, on taking the bills, duly indorsed particulars on the letter of credit. The *Agra and*

Masterman's Bank stopped payment before the bills were presented for acceptance. Both banks were now in course of being wound up, and the official liquidator of the Asiatic Banking Corporation, who were still the holders of the bills, carried in a claim for their amount under the winding up of the Agra and Masterman's Bank. This was opposed on the ground that Dickson, Tatham, & Co. were indebted to Agra and Masterman's Bank to an amount exceeding what was due on the bills.

Mr. *G. M. Giffard*, Q. C., Mr. *Hannen*, and Mr. *Kekewich*, for the Appellant:—

We contend that the Appellant is entitled to prove on three grounds:—1. That Dickson, Tatham, & Co., were agents authorized by Agra and Masterman's Bank to promise that the latter would accept the bills. 2. That the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank to accept the bills. 3. That it would be a fraud on the part of the bank to deny their liability to pay the bills after they had been taken on the faith of the letter.

In Lord Mansfield's time, a promise like this would have constituted an acceptance; but we admit that even before the Mercantile Law Amendment Act (*a*), it could not, according to the later decisions, have that effect: *Bank of Ireland v. Archer* (*b*). We admit, therefore, that the persons who took the bills could not have sued upon them as bills; but the promise to accept a bill gives a right of action to the person to whom it was made; *Mason v. Hunt* (*c*); Story on Bills of Exchange (*d*); *Russell v. Wiggin* (*e*); *Marchington v. Vernon* (*f*). Now, looking at the purpose of the letter, it is clear that it was intended to be shown by Tatham & Co., as proof of their authority to pledge Agra and Masterman's Bank to accept the bills. Tatham & Co. were thus constituted agents to make a promise on behalf of the bank: *Pickard v. Sears* (*g*). Again, an open offer of this kind constitutes a contract with anyone who complies with its terms: *Williams v. Carwardine* (*h*); *Thatcher v. England* (*i*). Thus, in *Denton v. Great Northern Railway Company* (*j*), a promise to issue tickets by a particular train was held to give a right of action to a person who came to the station to get one and found that none were issued. The principle of these cases was affirmed in *Warlow v. Harrison* (*k*). It has been urged that there is no privity, but that is a fallacy arising from looking to the time of writing the offer, not to the time of the other person acting on it. In *Bank of Ireland v. Archer*, the point was raised on the pleadings, but the evidence did not support them, for there was only a private letter to the agent.

(*a*) 19 & 20 Vict. c. 97, s. 6. (*b*) 11 M. & W. 383. (*c*) 1 Doug. 296. (*d*) §§ 459, 461. (*e*) 2 Story's Rep. 213. (*f*) 1 B. & P. 101, n. (*g*) 6 Ad. & E. 469. (*h*) 4 B. & Ad. 621. (*i*) 3 C. B. 254. (*j*) 5 E. & B. 860. (*k*) 1 E. & E. 295, 309. (*l*) 11 M. & W. 383.

Here, what we rely upon is that the letter was written for the purpose of being shown. In *Pillans v. Van Mierop* (a), the money was advanced without any authority from the Defendants, and not on their credit; and the subsequent promise to accept was contended to be a mere *nudum pactum*. Yet the promise was held to give a right of action. The point incidentally arose in *Scott v. Pilkington* (b), but the case went off on another ground, and the decision does not affect us; there is only an *obiter dictum* of Blackburn, J., which makes against us. There is, therefore, a right of action in the person who takes a bill on the faith of a letter like this. Whether such a right of action can pass with the bill if it be negotiated may be a question, but if it cannot, an equitable right is created which will pass; and it would be against conscience for the bank to set up the state of the account between them and Tatham & Co. as a defence against repaying moneys advanced on the faith of a letter like this: *Jeffryes v. Agra and Masterman's Bank* (c), has really no bearing on the present case.

Mr. *Dickinson*, Q. C., and Mr. *Roxburgh*, Q. C., for the official liquidator of Agra and Masterman's Bank :—

There is no agency; the letter of credit was given for the benefit of Tatham & Co., who were not acting on behalf of the bank; and the letter would accomplish its object of benefiting them, without attributing to it the force now contended for. In *Pickard v. Sears* (d), the principal was standing by; there is nothing of the same kind here. *Pillans v. Van Mierop* (a), and *Mason v. Hunt* (e), were decisions by Lord Mansfield, who held that a promise to accept a future bill of exchange amounted to an acceptance of it, so that the authority of those cases on the present question, however great his Lordship's authority may be on other points, is but small. *Johnson v. Collings* (f) shows that a promise to accept a future bill is no acceptance, and that is all the letter amounts to in the present case. *Bank of Ireland v. Archer* (g) is in our favor; and the American cases, which Mr. Justice Story admits to be opposed to the last-named case, are not binding here. How can the indorsees be entitled to claim against the bank? they cannot be supposed to have seen the letter of credit, or to have advanced money on the faith of it. The case is distinguishable from *Denton v. Great Northern Railway Company* (h), and the cases of that class, in this—that there the advertisement was issued to all the world; here the letter was addressed to an individual firm.

[THE LORD JUSTICE CAIRNS :—Was not the letter intended to be shown?]

No doubt; but then we get upon the question of equitable, not legal liability. The transferees become equitable assignees of the benefit of

(a) 3 Burr. 1663. (b) 2 B. & S. 11. (c) Law Rep. 2 Eq. 674. (d) 6 Ad. & E. 469.  
(e) 1 Doug. 296. (f) 1 East., 98. (g) 11 M. & W. 383. (h) 5 E. & B. 860.

a contract between the bank and Tatham & Co., and must take, subject to the same equities as their assignors, *i. e.*, subject to the state of account between the bank and Tatham & Co. No doubt the liability to these equities might be excluded by apt words, but there is nothing of the kind in the instrument. *Jeffryes v. Agra and Masterman's Bank* (a) supports the claim to set off. Showing the letter is no more than telling the persons who take bills that the bank has promised Tatham & Co. to accept them; the liberty to communicate this promise cannot extend its effect, which is only to give Tatham & Co. a right of action if it is broken.

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Feb. 11. SIR G. J. TURNER, L. J. :—

I have had the opportunity of considering this case, with my learned brother, since the conclusion of the argument, and we do not think it necessary to trouble the counsel for the Appellant to reply.

The question turns upon the effect of the letter of the 31st of October, 1865, by the Agra Bank to Dickson, Tatham, & Co. [His Lordship read the letter, and continued.] Now, whatever may be the effect of that letter at law, whether there would be a right of action or not, it seems to me to give the persons who took and paid for bills on the faith of it a plain right in equity to compel the Agra Bank to accept and pay the bills. The letter was written in a double form; the first part of it contains the authority which is given to Dickson Tatham, & Co. to draw the bills; the second part is evidently, though not in terms, yet in substance, addressed to the persons who are to negotiate the bills. It is plain that this letter was given by the bank with a view to its being shown to persons who were to negotiate the bills, and to make advances upon the faith of the letter; and the last passage contains these words: "Parties negotiating bills under it are requested to indorse particulars on the back hereof." It is plain that this part of the letter is in truth addressed to the person by whom the bills were to be negotiated. The whole effect of the letter is, that the Agra Bank held out to the persons negotiating the bills a promise that it would pay the bills; and it would be impossible, according to my view of the doctrines of Courts of equity to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. Apart, therefore, from any question as to how

(a) Law Rep. 2 Eq. 674.

the case may stand at law, I think that there clearly is a perfectly good equity to sustain a bill filed by any one of the persons by whom bills drawn under the letter of credit had been negotiated, to compel the Agra Bank to accept and pay these bills which were taken and paid for upon the faith of the statement which was made in the letter.

SIR H. M. CAIRNS, L. J.:—

It is not disputed in this case that the letter of credit of the 31st of October, 1865, from the Agra and Masterman's Bank to Dickson, Tatham & Co., constituted a contract between those parties, based upon a sufficient consideration, moving from Dickson, Tatham, & Co. to the bank; or that the Asiatic Banking Corporation, when they took and discounted or paid for the bills upon which a claim is now made, had notice, and took the bills on the faith, of this letter; or that the bills were drawn in the form prescribed by the letter. But it is contended that the letter, being in form addressed to Dickson, Tatham, & Co. constituted a contract with no one but them; and that this contract even if assignable in equity, could not be assigned otherwise than subject to all equities between Dickson, Tatham, & Co. and the Agra and Masterman's Bank and that Dickson, Tatham, & Co., are indebted to that bank in an amount exceeding the bills.

The letter of the 31st of October, 1865, is in form addressed to Dickson, Tatham, & Co., but it is evident that it is written to Dickson, Tatham, & Co., in order that it may be shown by them to those who were to take the bills drawn on the Agra and Masterman's Bank; that it is intended by the writers to be used as an inducement to make persons take those bills; and that the bills were to be taken by such persons "under" the letter, that is, upon the faith and under the protection and security of the letter. It is a general invitation issued by the Agra and Masterman's Bank, through Dickson, Tatham, & Co., to all persons to whom the letter may be shown, to take bills drawn by Dickson, Tatham, & Co., on the Agra and Masterman's Bank, with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation.

If it be necessary to determine the question of the legal liability of the Agra and Masterman's Bank, I am of opinion that upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra and Masterman's Bank, in favor of the Asiatic Banking Corporation. The cases as to the offer of rewards, of which the case of *Williams v. Carwardine* (a) is an example, followed by the somewhat analogous cases of *Denton v. Great Northern Railway Company* (b),

(a) 4 B. & Ad. 621.

(b) 5 E. & B. 860.

*Warlow v. Harrison* (a) and *Scott v. Pilkington* (b), appear to me to be sufficient authority to show that there may be privity of contract in such a case; and if the view be adopted which appears to have been taken in the American Courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road.

But assuming the contract to have been at law a contract with Dickson, Tatham, & Co., and with no other, it is clear that the contract was in equity assignable, and that Dickson, Tatham, & Co. must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities. The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor, and without reference to any collateral or cross claims. Unless this is done, the letter is useless; Dickson, Tatham, & Co. obtain no benefit from it; the takers of the bills obtain no protection under it. In this view of the case, the Asiatic Banking Corporation are, in my opinion, assignees of the contract with Dickson, Tatham, & Co., free from any equities between Dickson, Tatham, & Co. and the Agra and Masterman's Bank.

I think the claim should be allowed, and the Asiatic Banking Corporation, or their liquidators, should have their costs here and in the Court below out of the estate of the Agra and Masterman's Bank.

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### TAYLOR v. LAIRD.

IN THE EXCHEQUER, JUNE 10, 1856.

[Reported in 25 *Law Journal Reports Ex.* 329.]

ACTION upon a contract to employ the plaintiff and to pay him 50*l.* a month as master of a ship for a certain voyage; with a common count for work and labor.

Plea, to the first count, *inter alia*, that the plaintiff did not act according to the agreement in the command of the vessel during the

(a) 1 E. & E. 295, 309.

(b) 2 B. & S. 11.

voyage, but made default in so doing; to the second count, *nunquam indebitatus*.

At the trial, at Guildhall, before the Lord Chief Baron, at the Sittings after Hilary term, it appeared that the defendant had written to the plaintiff, offering to engage him for the command of a steamer destined for an exploring and trading voyage up the River Niger, paying him at the rate of 50*l.* a month, commencing from a fixed date, the 1st of December, 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied in writing that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade," and on the other terms mentioned in the defendant's letter. The plaintiff received 50*l.* a month for several months before the voyage commenced, and afterwards proceeded in command of the vessel. In the course of the voyage up the river, and before the trading part of it commenced, disputes having arisen between the plaintiff and one of the gentlemen sent out with him to conduct the exploring and trading business of the expedition, the plaintiff, in August (the ninth month from his retainer), relinquished to that gentleman "the navigation and social management" of the vessel; and from that time until the end of the voyage it did not appear that he took any actual part in the navigation or general management, although he professed at the time his readiness to lend every assistance, and co-operated in the trading. When the vessel on her return reached Fernando Po, he discharged a native crew who had been engaged for the navigation of the Niger, landed different portions of the cargo, engaged other sailors to complete the crew, ordered repairs to be done to the ship, and came home in her to Limerick. There was no evidence that he had actually conducted the navigation of the vessel to Limerick; but when she reached that port he received a letter from the defendant (who had previously heard of the plaintiff's relinquishment of the actual command), desiring him to discharge the crew, &c. The plaintiff had received seven months' salary, and had entered on the ninth month when he gave up the command. There was evidence of an amount of trade, on which the 20*l.* per cent. commission would come to 172*l.*

The jury found the plea to the second count for the defendant, being of opinion that the plaintiff had wrongfully abandoned the command of the vessel; but on the *indebitatus* count they found for the plaintiff for 672*l.*, *i. e.* 500*l.* for ten months' salary, at 50*l.* a month, and 172*l.* for commission on the net produce of the sale, at 20*l.* per cent.

The court, last term, granted a rule *nisi* to enter a verdict for the defendant or for a new trial, on the grounds that the verdict was unsupported by the facts, or that the amount was excessive. Against this rule—

*Sir F. Thesiger, Montague Smith, and Maude*, on a former day in Easter term, showed cause.—First, the plaintiff was entitled to recover upon the special contract under the *indebitatus* count, at all events for one month's salary 50l.; or, secondly, he was entitled to recover under that count upon a new contract, either implied in law or of which there was evidence in fact; thirdly, the verdict was not so excessive in amount as that it ought to be set aside solely on that ground. Admitting that the plaintiff broke his contract by relinquishing the actual navigation of the vessel, it by no means follows that he thereby lost all rights under the contract; and, at all events, he was clearly entitled to recover the 50l. for the last of the months he had completed before he relinquished the navigation; and he could recover that as a debt under the common count, even if he could not recover on the same count another month's salary in lieu of notice—*Hartley v. Harman* (a).

[POLLOCK, C. B.—Clearly he could not recover anything under the *indebitatus* count for the broken month.—*Goodman v. Pocock* (b). And even as to the last of the months he had completed before he had relinquished the navigation, there is this difficulty in the way of his recovering: is not the contract *entire*? There was no stipulation that the salary should be payable monthly.]—

That it is submitted, was implied in the plaintiff's acceptance of the offer, "to be paid 50l. a month."

[POLLOCK, C. B.—Still, even if the payments were to be monthly, there would be a difficulty in holding that a right of action accrued at the end of each month for the month's salary. The plaintiff received several months' salary before the voyage commenced at all, and before the exploring part of it began. Now, it cannot be doubted that the consideration for so large a salary as 50l. a month was mainly the navigation of the vessel during the voyage; and yet if the argument on the part of the plaintiff is correct, he could have refused going on the voyage at all, and the defendant could not have recovered back the salary he had paid him: but the plaintiff could have recovered it if it had not been paid.]

That might have been provided for in the contract. But another difficulty, equally great, lies in the way of the argument on the part of the defendant, viz.: that unless each month's salary as it was earned constituted a separate debt and cause of action, and supposing the contract, in the strictest sense, to have been entire, so that nothing could have been recovered under it until it had been entirely performed on the part of the plaintiff, his executors could have recovered nothing if he had died during the last month of the voyage.

[POLLOCK, C. B.—It might make a difference, that the non-comple-

(a) 11 Ad. & E. 798; s. c. 9 Law J. Rep. (N.S.) Q.B. 179.

(b) 15 Q. B. Rep. 576; s. c. 19 Law J. Rep. (N.S.) Q.B. 410.



tion of the contract arose, not by his own default, but by the act of God.]

It is submitted that the distinction would not affect the principle as to the entirety of the contract. And even if it would, and supposing that the plaintiff had, either through loss of health, or even, as in the present case, in consequence of disagreements, voluntarily given up the actual navigation during the last month of the voyage, the argument for the defendant, leading as it does to the conclusion that the plaintiff could have recovered nothing, is not the less untenable and tends to a manifest absurdity and injustice which the parties could not have contemplated.

[POLLOCK, C. B.—But upon your construction the plaintiff might have refused to go on the voyage at all, and then recovered four or five months' salary as due before the voyage was to commence. Suppose an agricultural laborer engaged for a year left his employer just at the beginning of harvest-time, could he recover *pro rata*?]

There the contract would be for a year, and would be in the strictest sense entire.

[POLLOCK, C. B.—Suppose the wages were to be paid monthly would it make any difference?]

It would, it is conceived, make all the difference whether he was retained at yearly wages or at so much a month, as in the present case. The analogy between the case suggested and the present would be nearer if it were supposed that the farm-servant engaged at a yearly salary had completed a year's service. Could he not sue for the year's salary?

[POLLOCK, C. B.—There may be a difference between cases of retainer, simply at so much a month or a year for an indefinite period, as a continuing kind of contract measured merely by time and terminable by either party at certain notice, and a contract like the present for a specific piece of work, as a certain voyage, the claim being for salary alleged to have accrued before the main object of the contract was effected, and before the most important part of the voyage began. Does not that more resemble the case of the farm-servant retained on a yearly hiring and leaving in the middle of the year, at harvest-time?]

It is contended that this is merely the ordinary case of a person employed at a monthly salary, for the duration of the voyage was indefinite. The cases in which the default of the party employed has prevented him from recovering are cases in which he has left during the period for which the instalment or payment of salary became due, or for which the contract excluded the state of things which had occurred, as conferring any right to recover salary *pro rata*. And in the present case it is submitted that there is no principle upon which the plaintiff should be precluded from recovering his salary for the month he had

completed before he relinquished the navigation. And, secondly, there is nothing to preclude his recovering salary on the *indebitatus* count, by virtue of the special contract, for any period for which the jury might think it due. Their finding, although it establishes that the plaintiff had broken the contract, by no means establishes that he had thereby put an end to it, even as the measure of remuneration for the service actually performed, nor does it establish that he had altogether failed to perform the contract and render service under it, of the extent of which they were the judges. It only appeared that he had given up the actual "navigation and social management" of the vessel, but though this would sustain their finding, it could not put an end to the contract, for it did not involve an utter failure of consideration. The plaintiff still remained in the vessel, ready to assist in the navigation and management, and it appeared that he did actually take part in the management of it. It is as though he had, ostensibly, relinquished the actual management to another, retaining the ultimate control. This may have been strictly and technically a breach of the contract, but no substantial failure of performance, and so the jury may have intended by their finding on the special count, which in that sense is not at all inconsistent with their finding on the *indebitatus* count.

[POLLOCK, C. B.—There is a difficulty in considering a contract as broken and yet as not broken.]

It may have been technically broken, but not substantially.

[POLLOCK, C. B.—Then, would the finding for the defendant on the special count be sustainable? If so, surely the plaintiff cannot recover on that count.]

In effect the plaintiff performed the contract, and can recover his salary under it on the *indebitatus* count.

[POLLOCK, C. B.—If the plaintiff had said, I will not relinquish the command, but I shall observe the advice and direction of A. B., he would have been entitled to the verdict on the special count.]

In effect, that was what he did. Secondly, there was evidence from which the jury were at liberty to infer a new contract to pay the plaintiff for his services after his relinquishment of the navigation *quantum meruit*. There were services certainly performed at Fernando Po, and the jury were the judges of the value of the plaintiff's assistance on board the vessel during the whole of the voyage. And the defendant, after hearing that the plaintiff had relinquished the navigation, and knowing what he had done, gave him directions as to the discharging the cargo and the crew, thereby recognizing him as still in his service, either under the old contract, or under a new one to pay him *quantum meruit*.

[BRAMWELL, B.—The breach of the original contract had taken place, and the subsequent services, whatever they were, were done

without the request of the defendant. Moreover, he may have believed that the plaintiff was adequately remunerated for such services as he had actually performed by his having received a free passage home. What evidence is there of a new contract to pay for those services?]

[POLLOCK, C. B.—Such evidence as you press of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The defendant did not know of the services you rely on until the return of the vessel, and it was then something past, which would not imply—perhaps would not support—a promise to pay for it.]

The defendant had the benefit of the plaintiff's services during the voyage.

[POLLOCK, C. B.—Without his knowledge or request, setting aside the special contract. Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself. So in the present instance. The ship came home, say partly by the assistance of the plaintiff: what could the defendant do but receive his ship back again? There was nothing in that to imply a contract to pay the defendant anything.]

But there was more than that. The directions to the plaintiff to do work after the return of the vessel were evidence of a recognition of the plaintiff as being in the service of the defendant, and so of his past assistance having been in such service. Thirdly, the amount of the verdict was not so excessive as to warrant the Court in disturbing it. The jury were the proper judges of the value of the services performed.

*W. H. Watson, J. Wilde and Tomlinson*, for the defendant.—The contract was an entire and single contract, the mode of payment to be at the rate of 50*l.*, and is within the rule laid down in *Cutter v. Powell* (a). The right of the plaintiff to recover may be tested in this way. Suppose, on arriving at Fernando Po, he had refused to go any further, he would then, if the contract is to be read as the plaintiff contends, have received seven monthly payments, amounting to 350*l.* In that case the defendant would have been entitled to recover it back as on a failure of consideration, the object of the voyage being the ascent of the Niger. In *Vlierboom v. Chapman* (b) Parke, B., in his judgment, says, "To justify a claim for *pro rata* freight, there must be

(a) 6 Term Rep. 320; s. c. 2 Smith's Leading Cases, 1.

(b) 13 Mee. & W. 230; s. c. 13 Law J. Rep. (N.S.) Exch. 384.

a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with." So here, if the defendant, being present, said, "I do not require you to go on any further," the plaintiff would have been in a situation to claim for his services *pro rata*; but he was not there, and there was no agent but the plaintiff himself, who did as he liked. The principle upon which the present case is to be distinguished from ordinary cases of hired servants paid by salary, monthly or quarterly, is that where the service is *homogeneous* in character, so that the value of service for one month or quarter is the same as the value of another, and the value of one is not less because subsequent service may not be performed: there a distinct cause of action may arise at the expiration of any month or quarter of actual service, for a month or a quarter's salary; but it is not so where the service is not homogeneous, but is not only of very different value to the employer at different periods, but the value of the former part of the service is little or nothing unless the latter part of the service is also rendered. It was so in this case, for the essence of the consideration for the contract was the exploring part of the voyage, and the plaintiff failed to render service at that very part. It is not a case of imperfect performance or partial failure of consideration, but of entire default and of total failure. The service contracted for was not in fact rendered, viz. the service in the exploring part of the voyage. That was the gist of the consideration, and failure in that was failure *in toto*. The monthly payments were merely the measure of remuneration. It is as though an artist had been retained to paint a picture to be paid for at 50*l.* a month during the time he should be engaged upon it. In such a case surely the artist could not sue for any money if he stopped before he completed the picture.

[BRAMWELL, B.—Do you mean to contend that he could not sue for any money before he completed the picture?]

It is contended that he could not.

[BRAMWELL, B.—You must argue that in that case and the present no cause of action would accrue until the completion of the contract by the execution of a picture or the conclusion of the voyage. Then, do you say that, supposing the plaintiff in this case had died shortly before the completion of the voyage, he could recover nothing?]

Not unless the voyage had been substantially performed, as, for instance, if the ship had been out and had finished the expedition and was on its return home. But if the voyage had not been substantially completed, the plaintiff's representatives could not upon his death recover on the contract. This, however, is a case not of death, but of wilful default. And as, even entire, the contract is terminated by mutual consent, no implied contract necessarily arises to remunerate

the party *quantum meruit*—*Lamburn v. Cruden* (a). It is a question of fact, whether any such new contract has arisen, and here there was no evidence of it. And, at all events, the damages were excessive.

[*Per Curiam*.—Clearly they were so: and on that ground alone there would be a new trial, and the only question is as to whether the verdict ought not to be for the defendant. As to that we will consider.] *Cur. adv. vult.*

POLLOCK, C. B. now delivered the judgment of the Court (b).—We are of opinion that the plaintiff is entitled to a verdict for 50*l.* (c) on the first count, upon the ground that the contract was for monthly payments of 50*l.*, and that eight months had elapsed and only seven had been paid for. In the defendant's letter, indeed, to the plaintiff, it was written, "Your pay to be at the rate of 50*l.* per month;" and what would have been the effect of those words had they been unqualified and unexplained by anything else it is unnecessary for us to say: for, in the plaintiff's answer, he uses the expression, "The pay to be 50*l.* per month." If this does not differ from the defendant's letter, it shows what it meant; if it does, it was a new offer, approved and accepted by the defendant, and which is to be considered as the basis of the contract, and thus it serves either to supersede or to explain the original letter of the defendant. [There "50*l.* per month" means each month, and gave a cause of action as each month elapsed. And a right of action thus once vested could not be divested by the plaintiff's deserting or abandoning the voyage.] The words are plain, and no mercantile man could doubt what they meant. Moreover, if this construction were not given to it, the result would be, that if the plaintiff had died or relinquished the command at any time before the end of the voyage, nothing would have been payable. This could not have been intended by the parties. It was said, indeed, that if the plaintiff's construction were to be adopted, he might have relinquished the command before the voyage began, and recovered his pay for the period previous to its commencement. No doubt that consequence would follow. But contracts should be construed as though they were made upon the supposition that the parties would keep them, not break them, and on that supposition the plaintiff's construction is reasonable; the defendant's is not. And, further, the pleadings on the other side appear to imply that the claim could only be barred as to the period for which the months had not run. As to the other question, we think there was some evidence to go to the jury upon the part of the plaintiff, but that the damages should be, on the special count, only nominal

(a) 2 Man. & G. 253; s. c. 10 Law J. Rep. (N.S.) C.P. 121.

(b) Pollock, C.B., Alderson, B., Martin, B., and Bramwell, B.

(c) It had been proposed to the parties

that the Court should say, if they deemed the plaintiff entitled to so much, what damage he was entitled to (if any) on the special count, and so avoid a new trial by entering a verdict.

or next to nominal. If the plaintiff is content, he may enter a verdict for 50*l.*, otherwise there must be a new trial.

*Rule absolute to reduce the verdict to 50*l.*, otherwise for a new trial.*

### FELTHOUSE v. BINDLEY.

IN THE COMMON PLEAS, JULY 8, 1862.

[Reported in 11 *Common Bench Reports, New Series*, 869.]

THIS was an action for the conversion of a horse. Pleas, not guilty, and not possessed.

The cause was tried before Keating, J., at the last Summer Assizes at Stafford, when the following facts appeared in evidence :—The plaintiff was a builder residing in London. The defendant was an auctioneer residing at Tamworth. Towards the close of the year 1860, John Felthouse, a nephew of the plaintiff, being about to sell his farming stock by auction, a conversation took place between the uncle and nephew respecting the purchase by the former of a horse of the latter ; and, on the 1st of January, 1861, John Felthouse wrote to his uncle as follows :—

“ Bangley, January 1st, 1861.

“ Dear Sir,—I saw my father on Saturday. He told me that you considered you had bought the horse for 30*l.* If so, you are laboring under a mistake, for, 30 *guineas* was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price, as I would not take less.

“ John Felthouse.”

The plaintiff on the following day replied as follows :—

“ London, January 2nd, 1862.

“ Dear Nephew,—Your price, I admit, was 30 *guineas*. I offered 30*l.*,—never offered more : and you said the horse was mine. However, as there may be a mistake about him, I will split the difference,—30*l.* 15*s.*—I paying all expenses from Tamworth. You can send him at your convenience, between now and the 25th of March. If I hear no more about him, I consider the horse mine at 30*l.* 15*s.* “ Paul Felthouse.”

To this letter the nephew sent no reply ; and on the 25th of February the sale took place, the horse in question being sold with the rest of the stock, and fetching 33*l.*, which sum was handed over to John Felthouse. On the following day, the defendant (the auctioneer), being apprised of the mistake, wrote to the plaintiff as follows :—

“ Tamworth, February 26th, 1861.

“ Dear Sir,—I am sorry I am obliged to acknowledge myself forgetful in the matter of one of Mr. John Felthouse’s horses. Instructions were given me to reserve the horse : but the lapse of time, and a multiplicity of business pressing upon me, caused me to forget my previous promise.

I hope you will not experience any great inconvenience. I will do all I can to get the horse again: but shall know on Saturday if I have succeeded.

“William Bindley.”

On the 27th of February, John Felthouse wrote to the plaintiff, as follows :—

“Bangley, February 27th, 1861.

“My dear Uncle,—My sale took place on Monday last, and we were very much annoyed in one instance. When Mr. Bindley came over to take an inventory of the stock, I said that horse (meaning the one I sold to you) is sold. Mr. B. said it would be better to put it in the sale, and he would buy it in without any charge. Father stood by whilst he was running it up, but had no idea but he was doing it for the good of the sale, and according to his previous arrangement, until he heard him call out Mr. Glover. He then went to Mr. B. and said that horse was not to be sold. He exclaimed he had quite forgotten, but would see Mr. Glover and try to recover it, and says he will give 5*l.* to the gentleman if he will give it up: but we fear it doubtful. I have kept one horse for my own accommodation whilst we remain at Bangley: and, if you like to have it for a few months, say five or six, you are welcome to it, free of any charge, except the expenses of travelling: and if, at the end of that time, you like to return him, you can; or you can keep him, and let me know what you think he is worth. I am very sorry that such has happened; but hope we shall make matters all right; and would have given 5*l.* rather than that horse should have been given up.

“John Felthouse.”

On the part of the defendant it was submitted that the letter of the 27th of February, 1861, was not admissible in evidence. The learned judge, however, overruled the objection. It was then submitted that the property in the horse was not vested in the plaintiff at the time of the sale by the defendant.

A verdict was found for the plaintiff, damages 33*l.*, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the objection was well founded.

*Dowdeswell*, in Michaelmas Term last, accordingly obtained a rule nisi, on the grounds that “sufficient title or possession of the horse, to maintain the action, was not vested in the plaintiff at the time of the wrong; that the letter of John Felthouse of the 27th of February, 1861, was not admissible in evidence against the defendant: that, if it was admissible, being after the sale of the horse by the defendant, it did not confer title on the plaintiff; and that there was at the time of the

wrong no sufficient memorandum in writing, or possession of the horse, or payment, to satisfy the statute of frauds." *Carter v. Tous-saint*, 5 B. & Ald. 855, 1 D. & R. 515, and *Bloxam v. Sanders*, 4 B. & C. 941, 7 D. & R. 396, were referred to.

*Powell* showed cause. There was an ample note of the contract in writing to satisfy the statute of frauds. When the parties met in December, 1860, it was agreed between them that the plaintiff should become the purchaser of the horse. It is true, there was a slight misunderstanding as to the price, the plaintiff conceiving he had bought it for 30*l.*, the nephew thinking he had sold it for 30 guineas. On being apprised by the nephew that he was under a mistake, the plaintiff wrote to him proposing to split the difference, concluding with saying,—“If I hear no more about him, I consider the horse is mine at 30*l.* 15*s.*” The question is whether there has not been an acceptance of that offer by the vendor, though nothing more passed between the uncle and nephew until after the 25th of February, the day on which the sale by auction took place. Could the plaintiff after his letter of the 2nd of January have refused to take the horse? It is true that letter was unanswered; but it was proved that the nephew afterwards spoke of the horse as being sold to the plaintiff, and desired the auctioneer (the defendant) to keep it out of the sale. Although written after the conversion, the letter of the 27th of February was clearly evidence, and, coupled with the plaintiff's letter of the 2nd of January, constituted a valid note in writing, even as between the uncle and the nephew. [*Keating, J.* You were bound to show a binding contract for the sale of the horse before the 25th of February.] The letter of the nephew of the 27th is an admission by him that he had before that day assented to the bargain with the plaintiff. [*Byles, J.* That only shows a binding contract on the 27th of February. What right had the plaintiff to impose upon the nephew the trouble of writing a letter to decline or to assent to the contract?] It was not necessary that he should assent to the contract by writing: it is enough to show that he assented to it. [*Byles, J.* There was no delivery or acceptance: and there could be no admission of delivery and acceptance. *Willes, J.* To be of any avail, you must make out a valid contract between the uncle and nephew prior to the 25th of February.] It was not necessary that the assent to the terms of the plaintiff's letter should be in writing. In *Dobell v. Hutchinson*, 3 Ad. & E. 355, 5 N. & M. 251, it was held, that, where a contract in writing, or note, exists which binds one party to a contract, under the statute of frauds, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any contract which contains them. So, in *Smith v. Neale* (a), it was held that a written proposal, containing

(a) 2 C.B., (N. S.) 67.



the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of mouth, is a sufficient agreement within the 4th section of the statute of frauds. [ *Willes, J.* That was a very peculiar case. The plaintiff had done all that she had agreed to do, and nothing remained to be done but performance on the defendant's part. But, to say that transactions between third parties are to be controlled or affected by an intermediate letter written by a person who is no party to the record, is a somewhat startling proposition. *Byles, J.* I feel great difficulty in seeing how the nephew's subsequent admission can be binding on the defendant, or even evidence against him.] It is enough that the memorandum relied on to satisfy the statute of frauds is made at any time before action brought: *Bill v. Bament*, 9 M. & W. 36.

*Montague Smith, Q. C.*, and *Dowdeswell*, in support of the rule. The letter of the 27th of February was clearly inadmissible. The 17th section of the 29 Car. 2, c. 3, provides that "no contract for the sale of any goods, &c., shall be allowed to be good, except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract," &c. At the time the sale complained of here took place, there clearly was no binding contract for the sale of the horse by the nephew to the plaintiff. [ *Willes, J.* Could the plaintiff have insured the horse on the 25th of February? ] He could not: he had no insurable interest. [ *Willes, J.* As to third persons, one cannot see any reason for giving a relation to the subsequent writing, though as between the immediate parties one can.] *Carter v. Toussaint*, 5 B. & Ald. 855, 1 D. & R. 515, is a far stronger case than the present. There, a horse was sold by verbal contract, but no time was fixed for payment of the price. The horse was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time, the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors; and it was held that there was no acceptance of the horse by the vendee, within the 29 Car. 2, c. 3, s. 17. And see *Smith's Mercantile Law*, 4th edit. p. 468 et seq. Here, the plaintiff had clearly no property in the horse on the 25th of February, the day of the sale by the defendant. How, then, can an admission *ex post facto* by a stranger affect the relative positions of the parties to this record on that day?

*WILLES, J.* I am of opinion that the rule to enter a nonsuit should be made absolute. The horse in question had belonged to the plaintiff's nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for 30*l.*, the nephew

that he had sold it for 30 guineas : but there was clearly no complete bargain at that time. On the 1st of January, 1861, the nephew writes,—“I saw my father on Saturday. He told me that you considered you had bought the horse for 30*l*. If so, you are laboring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price.” To this the uncle replies on the following day,—“Your price, I admit, was 30 guineas. I offered 30*l*.; never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at 30*l*. 15*s*.” It is clear that there was no complete bargain on the 2nd of January : and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for 30*l*. 15*s*. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him : the uncle might also have retracted his offer at any time before acceptance. It stood an open offer : and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named,—30*l*. 15*s* : but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me, that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale. Then, what is the effect of the subsequent correspondence ? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of the 27th of February, which is relied on as showing that he intended to accept and did accept the terms offered by his uncle’s letter of the 2nd of January. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before the 25th of February, sufficient within the Statute of Frauds. It seems to me that the former is the more likely construction : and, if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before the 25th of February, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain then for the first time concluded, it would be directly contrary to the decision of the court of Exchequer in *Stockdale v. Dunlop*, 6 M. & W.

224, to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim. In that case, Messrs. H. & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm-oil, agreed *verbally* to sell the plaintiffs two hundred tons of oil,—one hundred tons to arrive by the *Antelope*, and one hundred tons by the *Maria*. The *Antelope* did afterwards arrive with one hundred tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The *Maria*, having fifty tons of oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon,—it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

BYLES, J. I am of the same opinion, and have nothing to add to what has fallen from my Brother Willes.

KEATING, J. I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But, as between the uncle and the auctioneer, the only question we have to consider, is, whether the horse was the property of the plaintiff at the time of the sale on the 25th of February. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

WILLES, J. *Coates v. Chaplin*, 3 Q. B. 483, 2 Gale & D. 552, is an authority to show that John Felthouse might have had a remedy against the auctioneer. There, the traveller of Morrisons, tradesmen in London, verbally ordered goods for Morrisons of the plaintiffs, manufacturers at Paisley. No order was given as to sending the goods. The plaintiffs gave them to the defendants, carriers, directed to Morrisons, to be taken to them, and also sent an invoice by post to Morrisons, who received it. The goods having been lost by the defendants' negligence, and not delivered to Morrisons,—it was held that the defendants were liable to the plaintiffs.

*Rule absolute.*

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### ELIASON ET AL. v. HENSHAW.

SUPREME COURT OF THE UNITED STATES, FEB. 17, 20, 1819.

[Reported in 4 *Wheaton*, 225, 4 *Curtis*, 382.]

ERROR to the Circuit Court for the District of Columbia.

*Jones and Key*, for the plaintiff in error.

*Swann*, for the defendant in error.

WASHINGTON, J., delivered the opinion of the Court.

This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times in Georgetown, and will be glad to serve you, either in receiving your flour in store when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a post-script they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th instant was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at \$9.50 per barrel, I accept and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, that will be unnecessary,—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiff's first letter was sent, informed them, when he received it, that he should not probably return to

Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the Court below, the plaintiffs in error, moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The Court being divided in opinion, the instruction prayed for was not given.

The question is, whether the Court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon by which the letter was despatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer; and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour; and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo*.

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HENDERSON *et al.* (STEAM-PACKET COMPANY) APPELLANTS.  
 STEVENSON . . . . . RESPONDENT.

IN THE HOUSE OF LORDS, JUNE 4, 1875.

[*Reported in Law Reports, 2 Scotch Appeal Cases, 470.*]

LIEUTENANT STEVENSON, of the 18th Royal Irish Regiment, purchased at the office of the owners of the *Countess of Eglinton* steamer, a ticket for his passage from Dublin to Whitehaven, and went immediately on board. The ship was wrecked off the Isle of Man on the following day, entirely through the fault of those in charge. Lieutenant Stevenson got ashore, and found refuge in a peasant's hut, suffering great personal inconvenience, and losing his luggage, which was never recovered. On the 19th of June, 1872, he brought the present action against the above Appellants for payment of £71 and costs.

The defence was a remarkable one; the Appellants insisting that they were free from all liability for injury either to the Pursuer or to his luggage; their allegation being that they had entered into no contract with him; and that, at all events, they were saved from responsibility by an indorsement on the ticket which he had received, there being on the back of it a printed intimation in the following words:—  
 “The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise.”

The Pursuer answered that the ticket on the face of it had only

these words: "Dublin to Whitehaven;" and that he had never looked at the ticket nor seen the notice on the back of it, no one having directed his attention to either; so that there was no assent on his part to the alleged stipulation,

The Lord Ordinary (Lord *Gifford*) gave judgment in favor of the Pursuer; and on a reclaiming note the Second Division of the Court of Session adhered to this decision (a).

Against this judgment the Defenders in the Court of Session appealed to the House, having for their counsel Mr. *Milward*, Q. C. and Mr. *E. C. Clarkson*; who maintained that the stranding of the ship was an accident of the seas, for which the Appellants were not liable; and insisted that upon a true construction of the contract between the Appellants and the Respondent they were not liable for his losses.

The following cases were cited, namely: *Zunz v. South Eastern Railway Company* (b); *Carr v. Lancashire and Yorkshire Railway Company* (c); and *Stewart v. North Western Railway Company* (d).

But at the close of the Appellant's argument, the Law Peers, without calling on the Respondent's counsel, Mr. *Cotton*, Q. C., and Mr. *Thesiger*, Q. C., delivered the following opinions:—

THE LORD CHANCELLOR (e):—

My Lords, two questions have been argued on this appeal; the first being whether the contract between the parties had incorporated in it certain conditions printed on the back of the ticket; the other being a question which arises only upon the supposition that those conditions were so incorporated—whether they were in themselves legal conditions, and what was their proper construction? Upon the second question, my Lords, I do not propose to make any observations; but I will ask your Lordships to direct your attention to the first question, the answer to which appears to me of itself sufficient to dispose of this case.

The Respondent, an officer in Her Majesty's 18th Royal Irish Regiment, desiring to travel from Dublin to Whitehaven, took from the above Appellants a ticket for the voyage, going into their ticket office on the wharf, at the North Wall of Dublin, alongside of which the steamship the *Countess of Eglinton* was lying. He paid the fare for the voyage, and obtained the ticket in return.

On the face of this ticket there are letters indicating the name of the steam packet company, and the words "Dublin to Whitehaven" This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him.

(a) Court of Session Cases, 4th Series, vol. i. p. 215.

(b) Law Rep. 4 Q. B. 545.

(c) 7 Ex. 707; 7 Railw. Cas. 426; 21 L. J. (Ex.) 261.

(d) 3 H. & C. 135. (e) Lord *Cairns*.

But, my Lords, on the back of the ticket there were printed these words :

This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company.

There were also hung up in the office a time bill, and a list of fares ; and also a general notice (*a*), which I need not further refer to, inasmuch as no evidence whatever was given that the Pursuer, saw, read, or indeed had an opportunity of reading that general notice. But the question arises what was the effect of handing to the Pursuer a ticket having the words which I have mentioned upon the face of it, and having those further sentences which I have read upon the back of it.

With regard to the knowledge of the Respondent of what was printed upon the back of the ticket, your Lordships have his own evidence, which is not controverted, and upon which he does not appear to have been challenged or cross-examined, that in point of fact he did not read and did not know what was printed upon the back of the ticket. There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the Respondent's attention to what was printed upon the back. Your Lordships therefore may take it as a matter of fact that the Respondent was not aware of that which was printed upon the back of the ticket ; consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket.

I asked with some anxiety what was the authority for the proposition that a member of the public was to be supposed to have contracted under those circumstances in that way ; and I have listened with great attention to all the authorities that have been cited. A great number of those authorities are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed either by the admission of both sides, or by the pleadings, that terms similar to those which I have read in the present case as printed on the back of the ticket formed part of the contract in those different cases. Those cases therefore have no relation whatever to the present. There were a considerable number of other cases in which for the conveyance of animals or of goods, a ticket or paper had been issued actually signed by the owner

(*a*) The general notice contained "an express condition that the passengers, and owners of the passengers' luggage, live stock, and goods, should undertake all risks whatsoever."



of the animals or by the owner of the goods. With regard, again, to those cases there might indeed be a question what was the construction of the contract, or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was assented to and was entered into by the person who received the ticket.

But what are the cases which are analogous in any way to the present? My Lords, of all that were cited there was really only one which could be said to approach the present case. That was a case tried in the Passage Court of Liverpool with regard to a ticket issued upon the occasion of an excursion train (*a*). And even with regard to that case, the observation is obvious that when it is examined it is not an authority at all to decide the present case. There a ticket had been issued to the excursionist which had upon the face of it "ticket as per bill." Therefore on that part of the ticket which the excursionist must have seen he was referred to some bill or other upon the subject of the ticket. It was in evidence further, by the admission of the excursionist himself, that he had seen and had read in the office a large bill on the subject of the arrangements with regard to the excursion; and that in that large bill he had seen a reference to some smaller bill or bills, but he had not referred to the smaller bills which were so mentioned. In that state of things, although the jury in the Passage Court found, and probably found rightly, that the excursionist was not aware of the contents of the smaller bills, the Court above (*b*) having leave to draw inferences of fact, came to the conclusion that, under the circumstances, the excursionist must be taken to have submitted himself to all the terms contained in the smaller bill, and to have been content to do that without reading in detail what those terms were.

I express, my Lords, no opinion upon that decision beyond saying that it does not in any way govern or cover the present case. The present case is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *dehors*. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger, on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him.

(*a*) *Stewart v. North-Western Railway Company*, 3 H. & C. p. 135.

(*b*) *The Court of Exchequer.*

It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited; and I agree entirely with the observation of the Lord Ordinary (a) in the present case, where he says in his note:

It has not been shown that the Pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that he knew either of the one or of the other. There is no reason to doubt the Pursuer's word when he says he never read the conditions on the back of the ticket. Now it seems fixed that, in a case like this, mere notice not brought home to and assented to by the Pursuer is not enough (b).

My Lords, the question does not, as it seems to me, depend upon any technicality of law or upon any careful examination of decided authorities. It is a question simply of common sense. Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? My Lords, it appears to me to be impossible that that can be held. The interlocutor of the Lord Ordinary, affirmed as it was in all respects by the Second Division of the Court of Session, appears to me to have been entirely correct; and I therefore move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the sole question is whether the Appellants are exonerated from all liability to the Respondent by reason of the notice on the back of the ticket delivered to him at the time of paying his passage-money. The Lord Ordinary (c) held that there was no proof that the Respondent assented to this notice, and therefore that the Appellants were responsible for the loss of his luggage, the vessel in which he was a passenger having been wrecked by the default of the Appellants' servants. The Lord Justice Clerk (c) and Lord Benholme (c) also thought there was no assent to the notice. Lord Cowan (c) and Lord Neaves (c) both thought that the terms and condi-

(a) Lord *Gifford*.

(b) 4th Series of Scotch Cases, vol. i. p. 216.

(c) See the several opinions of the Scotch Judges, 4th Series of Scotch cases, vol. i. p. 218.

tions indorsed upon the back of the ticket must be held to have been assented to and to have formed part of the contract between the parties. But the whole of the Judges of the Court below held that the loss sustained by the Respondent was not embraced by the words of the notice.

The steam packet company was established for the carriage and conveyance of passengers, passengers' luggage, live stock and goods. Their liability by law to a passenger is to carry and convey him with reasonable care and diligence, which implies the absence on the part of the company of carelessness or negligence. Of course any person may enter into an express contract with them to dispense with this obligation and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the want of care or for negligence, or even for the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice, without such assent, they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents. I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger.

The Lord Chief Justice in the case of *Zunz v. South Eastern Railway Company* (a), which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities which influence the judgment of the Lord Chief Justice; but although numerous authorities were cited by Mr. *Milward*, none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid. Or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed before the passenger has had an opportunity of reading the ticket, much less the indorsement. It may be a question whether, if a passenger were to read the indorsement and decline to agree to the

(a) Law Rep. 4 Q. B. 544.

terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common law liability alone, unless a special contract be entered into with the passenger. But it is unnecessary to consider this point.

I have expressed a view of the case which places the right of the Respondent to an interlocutor in his favor on a different ground from that which was assumed by the Court of Session; but I agree in the reasons which led them to their conclusion, because I think that a limitation of the legal liability of the steam packet company as carriers ought to be most strictly construed, as well as the assent to it distinctly proved. Therefore, my Lords, I agree with my noble and learned friend that the interlocutors ought to be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I entirely concur with my two noble and learned friends who have preceded me.

There are two questions and two questions only in this case. The first is, Has there been in fact any negligence on the part of the Defendants? That is a point upon which both the Lord Ordinary and the learned Judges of the Second Division of the Court of Session are perfectly clear, and as to which we should have great hesitation in differing from them if there was any doubt upon the subject; but as we can have none upon the evidence before us, it is not necessary for me to pursue the point. I assume, therefore, that the loss sustained by the Pursuer was entirely occasioned by the negligence of the Defendants.

The other point was as to whether the Pursuer had entered into a contract by which he agreed to be his own insurer, so to express it, not only against loss occurring in the course of the passage, but even against any neglect or default on the part of the servants or agents of the Appellants with whom he contracted. Now he entered into a contract as a passenger for the conveyance of himself and his luggage from Dublin to Whitehaven. In the absence of any restriction, assented to by him, to his right, he was entitled to consider himself as assured of that passage in safety, except so far, of course, as an obstacle might have arisen from any absolutely unavoidable accident. The carriers were obliged to use all due precaution and due care and diligence in carrying him and his luggage when once they had completed a contract as common carriers, for the purpose of so conveying him. They delivered to him a ticket, he having, in the first place, paid his money for the passage from Dublin to Whitehaven.

I agree with the observation that was made by my noble and learned friend (a), that, the money having been paid, and the ticket hav-

(a) Lord Chelmsford.

ing been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid. Of course, terms may be imposed by the carriers, and parties may agree to such terms in derogation of their right. Numerous authorities were cited by the counsel for the Appellants, but all those authorities I may say either showed (which the majority of them did) an actual signature by the party, binding him somewhat stringently to certain conditions, or they consisted of cases in which the pleading had been that whether there had been a signature or not there was an agreement; and that was admitted, and the cases turned and were decided upon that admission, which was, of course, as good as if a contract had been signed. Really, the only exception among the authorities was that noticed by my noble and learned friend the Lord Chancellor—the case in the Passage Court of Liverpool with regard to an excursion train; and I do not think it necessary to add any further observation upon that case.

In the present case the steam packet company having received the Pursuer's money, and having given him a receipt for it in the shape of a ticket which bore upon the face of it simply a heading with the initials of the title of the company and the words "Dublin to Whitehaven," what was the Respondent's position? He was entitled to consider that he had got a good and valid contract from common carriers to carry him upon the ordinary terms from Dublin to Whitehaven. That was his position, unless it can be shown that he had in some way varied that position by a special contract. Now it happens in this case, fortunately, that there can be no doubt as to whether he did or did not read or inquire further into those conditions which were on the back of the ticket. He positively swears in one part of his examination to not having read the notice printed on the back of his ticket, and in his cross-examination he is in no wise shaken on that subject. But not only that, your Lordships have one of the Appellants themselves called on the other side, namely, Mr. Robert Henderson, and this question is put to him in his cross-examination: "Did you give any instructions as to directing passengers' attention to these conditions?" And he says, "Yes; a large notice embodying the conditions appears on the bills we issue each month." Then he is asked, "Did you give any instructions to the clerk who issued the tickets on your behalf to direct the attention of passengers to what was printed on the back?" And his answer is, "No." The clerk himself is called, and he says in his cross-examination, "I cannot say who bought the cabin ticket for Whitehaven. I was not in the way of drawing the attention of passengers to the condition on the back of the ticket or to

the notice." That is clearly an admission of the fact that it was not this clerk's habit to call the attention of passengers to that which the Appellants seek to set up as part of the contract. It is an admission that, that condition being printed not on the face of the ticket, but on the back of it, he did not actually see to the passengers' attention being in any way called to it.

LORD O'HAGAN :—

My Lords, two questions have been raised in this case, and have been the subject of decision in the Court below; but, in the view which I take of it, the ruling of the first will dispense with any consideration of the second. The Respondent's loss, through the default of the Appellants, is plain, and now undisputed.

The Appellants reply upon a contract relieving them from liability; but the Respondent says that he never entered in such a contract: that the terms of it were never, in fact, made known to him; and that his assent to them was neither asked nor given. The question is one of evidence. Did the Respondent enter into such a contract? With the majority of the Judges in the Court below, and the noble and learned Lords who have preceded me, I am of opinion that he did not. And I have reached that conclusion substantially for the reasons which have been lucidly stated, and which it is not needful to repeat at any length.

Proof of the Respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a Court might be satisfied of their existence from antecedent dealings, notoriety of custom, publication of notices, verbal communication, and so forth; but I agree with the Lord Chancellor that the mere receipt of a ticket, under such circumstances, and with such an indorsement as we have before us, is not shown by the authorities cited at the Bar to furnish *per se* sufficient evidence of such assent or knowledge. We have positive and uncontradicted testimony that they did not exist; and in declining to discard that testimony on the strength of a false presumption, your Lordships will act in the spirit of the legislation which would have pronounced the contract we are asked to enforce void if the case had come within the statute. Of course, as it does not, we must deal with the facts as we find them: but it is satisfactory that we are enabled to decide in harmony with the policy of Parliament (a), which has relaxed the stringency of judicial decision in the interest of the public, and limited the power of companies to escape the proper consequences of their own misconduct or neglect.

We were asked by Mr. *Milhoard*, in the course of his able argument

(a) *Railway and Canal Traffic Act* (17 & 18 Vict. c. 31), and *Carriers Act* (11 Geo. 4 & 1 Will. 4, c. 68).

what more could the Appellant have done to furnish notice of the terms on which they proposed to contract? One answer—and there might be many more—was supplied by some of the cases which he cited, and in which the signature of the passenger or consignor demonstrated conclusively his conscious and intelligent assent to the bargain by which it was sought to bind him. When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted; and that the acceptance of them shall be unequivocally shown by the signature of the contractor. So the Legislature have pronounced, as to cases of canals and railways, scarcely distinguishable in substance and principle from that before us; and if the effect of your Lordships' affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law, and in protecting the ignorant and the unwary.

On the second question raised, I make no observation. The appeal, in my opinion, should be dismissed, with costs.

*Interlocutors appealed from affirmed; and appeal dismissed, with costs.*

## HARRIS v. THE GREAT WESTERN RAILWAY COMPANY.

IN THE HIGH COURT OF JUSTICE, APRIL 26, MAY 30, 1876.

[Reported in 1 Queen's Bench Division, 515.]

ACTION to recover the value of passenger's luggage delivered to the defendants at their cloak-room.

At the trial before Pollock, B., without a jury, a verdict was found for the plaintiff for 60*l.*, with leave to move to enter judgment for the defendants, the Court to have power to draw inferences of fact.

The facts are fully stated in the judgment of Blackburn, J.

April 26. *Thesiger*, Q. C., and *Digby*, for the defendants. The conditions on the back of the ticket were part of the contract: *Henderson v. Stevenson* (a); *Van Toll v. South Eastern Ry. Co.* (b); *York, Newcastle, and Berwick Ry. Co. v. Crisp* (c); *Stewart v. London and North Western Ry. Co.* (d); *Zunz v. South Eastern Ry. Co.* (e); *Johnson v. Great Southern and Western Ry. Co.* (f); *Lewis v. McKee* (g). Those cases show that express assent to the conditions was not necessary, and that the reference on the face of the contract, with the facts

(a) Law Rep. 2 H. L., Sc. 470.

(b) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

(c) 14 C. B. 527; 23 L. J. (C. P.) 125.

(d) 3 H. & C. 135; 33 L. J. (Ex.) 199.

(e) Law Rep. 4 Q. B. 539.

(f) Ir. Rep. 9 C. L. 108.

(g) Law Rep. 4 Ex. 58.

in evidence in this case, was sufficient to make the conditions part of the contract. The conditions, being part of the contract, protect the defendants from this loss: *Van Toll v. South Eastern Ry. Co.* (*supra*).

*Sir H. James, Q. C.*, and *Masterman*, for the plaintiff. The conditions on the back of the ticket were not part of the contract. *Henderson v. Stevenson* (*supra*), is a direct authority on this point. But even if they were, they do not protect the defendants; in the first place, because the contract was that the luggage should be put into the cloak-room, and it never was put there; in the second place, because the conditions cannot exempt the defendants from responsibility for gross negligence: *Birkett v. Willan* (*a*); *Hodges on Railways*, 5th ed. p. 546, citing *Wyld v. Pickford* (*b*).

[BLACKBURN, J. *Hinton v. Dibbin* (*c*) is against that contention.]

*Hinton v. Dibbin* (*c*) was a decision upon 11 Geo. 4 & Wm. 4, c. 68, and does not diminish the weight of *Wyld v. Pickford* (*b*) as an authority upon conditions apart from statute.

[BLACKBURN, J. In *Hinton v. Dibbin* (*c*) the effect of conditions apart from the statute was also considered.]

*Gill v. Manchester Ry. Co.*, (*d*) and *D'Arc v. London and North Western Ry. Co.* (*e*), the latter following *Robinson v. Great Western Ry. Co.* (*f*), show that the defendants are responsible, notwithstanding the conditions.

*Digby*, was heard in reply, and referred to *Gallin v. London and North Western Ry. Co.* (*g*) and *Peek v. North Staffordshire Ry. Co.* (*h*).

*Cur. adv. vult.*

May 30. The following judgments were delivered:—

LUSH, J. I agree with my learned Brothers in holding, and for the same reasons, that the goods in question were delivered to and were accepted by the company, upon the terms and conditions mentioned in the ticket, and that the contract of the company was therefore qualified by those conditions. But upon the second question, namely, whether, under the circumstances disclosed in the case, the company can avail themselves of the protection intended by the first condition, I have arrived at a different conclusion.

I think the condition is not applicable to the kind of custody in which these packages were kept. Of course, if a package intrusted to a warehouseman is restored to the owner in the same condition as it was when he delivered it, it matters not to him where and how it has been kept. The warehouseman in that case will have fulfilled his contract, and no cause of complaint arises though he may not have kept it in the place where he contracted to keep it. It is only when

(a) 2 B. & Ald. 356. (b) 8 M. & W. 443. (c) 2 Q. B. 646. (d) Law Rep. 8 Q. B. 186.  
(e) Law Rep. 9 C. P. 325. (f) 35 L. J. (C. P.) 123. (g) Law Rep. 10 Q. B. 212.  
(h) 10 H. L. C. 473; 32 L. J. (Q. B.) 241.



the package has been lost or damaged that it becomes material to inquire where it was deposited and how the loss or damage was occasioned, in order to ascertain whether it was attributable to any negligence of the warehouseman, for he is not an insurer, and is only responsible for loss or damage happening through his default. His contract is, to take due and reasonable care of the goods intrusted to him, which includes the keeping them in a suitable place where they will not be exposed to depredation, or to damage by weather, breakage, or otherwise. If, notwithstanding such due and reasonable care the goods are stolen, burnt, or damaged, he is not responsible; but if these casualties happen through his negligence he is.

The parcels in question being of comparatively small dimensions and weight, and therefore easily removable, ought to have been kept out of the way of thieves. If either had happened to be of less value than 5*l.*, and so not within the first condition, there would, I apprehend, have been no doubt in the mind of any one that the company would have been liable to make good the loss; and the ground of their liability would have been the not keeping it in a reasonably safe place of deposit. They would have been told that if they chose to keep such goods unguarded in a place of public resort, they did so at their own risk and not at the risk of the owner. If they had kept them in the cloak-room, and they had been stolen from thence by reason of the door being carelessly left open, or if they had been damaged by any carelessness of their servants, in that case also, the company would have been liable, but if, without any fault on the part of their servants, they had been stolen, burnt, or injured, the loss would have fallen on the owner.

The condition must, in my opinion, be read as intended to protect the company in cases where they would otherwise have been responsible by reason of the negligence of their servants in the keeping and management of the warehouse, and not to relieve them from the duty of warehousing at all. What the owner pays for is such an amount of security as a reasonably safe warehouse affords, and not the mere permission to leave the goods on the company's premises. In other words, the owner who does not insure takes upon himself a warehouse risk, the risk of his goods being stolen, burnt, or damaged while there. The argument on the part of the company casts on him a risk which no one contemplates when he pays for warehousing, and which would excuse the company not merely for want of care in the keeping, but for actual exposure of the goods in the open air, not only to every passing thief, but to damage by rain, or breakage, or otherwise, if this was done by their servants in neglect of their duty—in fact they would be irresponsible though no precaution whatever were taken to secure the safety of the goods.

I cannot think that this is the true meaning of the condition, because it would be utterly inconsistent with the relation of bailee for reward and bailor, and, in my view, equally inconsistent with the terms of the ticket itself.

The ticket is headed, "Luggage and cloak office." This, it is true, may merely be meant to indicate the place where it is issued. But it goes on to state that the sum charged is for "warehousing." It notifies that the company will not be responsible, under any circumstances for loss of, or injury to, articles, "except left in the cloak-room," that they will not deliver up luggage except to persons producing the ticket; and, lastly, that "the cloak-room is only open on Sundays at such times as the trains arrive at, and depart from, the station." What is this but a plain intimation that the goods are to be deposited in the cloak-room? Why, otherwise, should the depositor be informed at what hours the cloak-room is open on Sunday?

The inference is to my mind irresistible that the company, by the very terms of the ticket, engage to keep the goods in the cloak-room; and, that being so, the condition in question must be read as applying to a cloak-room custody, and as if the words had been that the company will not be responsible if they are stolen from the cloak-room, or burnt, or delivered to the wrong person, or damaged while there, although this may have been caused by the negligence of their servants. As the goods were never in the cloak-room, they were not subject to the condition. It seems needless to say that the loss is directly attributable to this breach of contract, for, if the articles had been in the cloak-room, the thief could not have got at them so as to pass them off as his own luggage.

The case closely resembles, I think, *Lyon v. Mells* (a). There a lighterman, who had given notice that he would not be answerable for any loss or damage to any cargo put on board his lighter, unless such loss or damage should be occasioned by want of ordinary care and diligence in the master or crew, and then only to the extent of 10 per cent. upon the loss or damage, was held not entitled to any protection where the damage was caused by the unseaworthiness of the lighter, a breach of the condition implied by law. The notice was construed as applicable solely to goods carried in a seaworthy vessel.

For these reasons I am of opinion that our judgment ought to be for the plaintiff.

MELLOR, J. In this case the facts and evidence, so far as they appeared on the trial before Pollock, B., without a jury, are sufficiently set out in the judgment about to be delivered by my Brother Blackburn, and I think it unnecessary to state them.

On the argument, two questions were made; first, whether the plaintiff

iff, under the circumstances, was bound by the terms of the ticket, which was delivered to her agent on his depositing the portmanteau and box in the custody of the defendants' servants in the vestibule to the cloak and luggage room; secondly, whether, on the true construction of the terms of the ticket, the company were relieved from liability by the fact, that on the deposit of the portmanteau and box no declaration was made of the true value and nature of the articles or property therein, as required by the second condition, each article being above the value of 5*l*.

The ticket in question was as underneath :—

"G. 56                                      Great Western Railway.

"No. 999                                      Paddington Station.

"(295)                                      Luggage and Cloak Office.

Friday the 29th of May, 1874.

Articles.	Amount.	
	<i>s.</i>	<i>d.</i>
1 Portmanteau . . . . .		2
1 Box . . . . .		2
Insurance on £——— at 1 <i>d.</i> per £ .		
Additional charge for —— days at 1 <i>d.</i> }		
each article per day. . . }		
Total .		

"Left in the name of \_\_\_\_\_  
and subject to the conditions on the other side.

"J. L., *Clerk*.

"This ticket to be given up when the luggage is taken away."

"Conditions. [On the back of the ticket.]

"N. B.—The Great Western Railway Company appoint that the undermentioned sums be paid them for warehousing passengers' luggage, which has been, or which is about to be, conveyed on their railways, viz. :—

"For any period not exceeding three days, twopence for each package; and after three days, one penny additional for each package per day, or part of a day.

"And they hereby give notice that they will not be answerable for loss of, or injury to, any such package beyond the value of five pounds, unless at the time of the delivery of such package to them the true value and nature thereof, and of the article or articles, or property therein, shall have been declared by the person delivering the same, and a sum at the rate of one penny per pound sterling of the declared

value be paid for such package for each day, or part of a day, for which the same shall be left, in addition to the before-mentioned ordinary warehouse charges.

"Every person depositing luggage will be furnished with a receipt, stating the number and description of the articles deposited, which receipt must be given up to the company's servants upon their delivery of the articles thereon described; and the company gives notice that they will not deliver up luggage, except to persons producing the proper receipt for the respective articles claimed, which delivery shall acquit the company from all further claims in respect thereof.

"The company will not be responsible, under any circumstances, for loss of, or injury to, articles, except left in the cloak-room.

"The company's servants are prohibited, under pain of instant dismissal, from receiving fees or gratuities, under any pretence whatever.

"On Sundays the cloak-room is only open at such times as the trains arrive and depart from their stations."

The counsel for the plaintiff very much relied on the authority of the case of *Henderson v. Stevenson* (a) in the House of Lords, and contended that the principle to be deduced from that case governed the present, and unless the present case can be distinguished, we are undoubtedly bound to follow that decision.

I do not intend to say that we are bound by all the dicta which fell from the learned Lords who delivered judgment seriatim in that case, but we are bound by the ratio decidendi to be collected from those separate judgments. In that case the Lords were judges both of law and of fact, but by the effect of the reservations in this case, we are in the same position, and acting in the capacity of judges we declare the law, and of jurymen we draw inferences from the facts. In the report of the case of *Henderson v. Stevenson* (a), the headnote, with substantial accuracy, represents the facts as follows:—"A ticket having on its face only the words 'Dublin and Whitehaven' was given to a passenger, who, without looking at it, paid for it and went on board. Having lost all his luggage, he brought an action against the company for its loss. Defence of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause." In carefully considering the judgments in that case, we find the Lord Chancellor thus expressing himself: "There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the respondent's attention to what was printed on the back." And further on he says: "The present is a case in which there was no reference whatever upon the ticket to anything other than that which was written upon the face. Upon that which was given to the

passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *dehors*." And, referring to the case of *Stewart v. North Western Ry. Co.* (a), he declined to express any opinion upon it beyond saying it did not govern the case then under consideration.

It is true that Lord Chelmsford intimated an opinion to the effect that "The moment the money for the passage is paid and accepted their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid."

Lord Hatherley's opinion seems to be in accord with Lord Chelmsford's as to the effect of the ticket being merely in the nature of a voucher that the passage-money has been paid.

Lord O'Hagan's opinion is certainly more in conformity with the reasons assigned by the Lord Chancellor, and he said "that the receipt of a ticket under such circumstances, and with such an indorsement as we have before us, is not shown by the authorities cited at the Bar to furnish, per se, sufficient evidence of such assent or knowledge."

Doubtless some of the observations which fell from Lord Chelmsford and Lord Hatherley may appear to have a bearing beyond the precise facts of that case, but I cannot help thinking that they were only intended to refer to the peculiar circumstances which there appeared, and the description of the ticket upon which the matter arose.

In the present case the journey of the plaintiff was complete and the responsibility of the company as carriers had ceased, but they had, for the convenience of the travelling public, established a luggage and cloak office, where passengers encumbered with luggage might, for their own convenience, deposit it on certain prescribed payments and on certain conditions both as to time of warehousing and re-delivery. *Prima facie*, therefore, and as a matter of common sense, the person depositing the luggage would expect to do it on some special terms and conditions as to remuneration and care. Accordingly, on the luggage being brought to the luggage and cloak office to be deposited, and a payment of so much per article being demanded for the temporary accommodation required by the passenger, and the number of the articles being ascertained, an entry was made in the presence of the depositor on a printed ticket, which is not only a statement of the fees to be paid to the company, but is also a voucher for the re-delivery of the articles deposited, and a statement of the conditions upon which alone the company will accept the deposit.

A fac-simile of the ticket, and of all the matters contained on it, are set out above, and it appears that, in order to render the ticket of a convenient size, the paper referred to was printed on both sides, the

first side specifying the articles as kept in the name of \_\_\_\_\_, and "subject to the conditions on the other side," followed by the initials of the clerk, and then, underneath, are printed the words, "this ticket to be given up when the luggage is taken away," and, on the other side, in conformity with the notice to that effect contained on the first side, are stated the conditions, and a notification of the times at which the cloak-room is open for receipt and delivery of packages.

The ticket in this case much resembles a half-sheet of paper, upon which the writer, having filled up one side, turns over the page and continues the matter on the other.

The depositor in the present case not only was aware that the paper ticket so filled up and handed to him, in exchange for the portmanteau and box, contained something relating to the deposit, but believed that it contained conditions. Drawing inferences from his evidence, I come to the conclusion that he knew that the ticket contained terms and conditions in which the deposit was made, although he did not choose to read them so as to become aware of the exact contents. Under such circumstances, it would indeed be strange to hold that he was not bound by the terms and conditions of the ticket, which he accepted without objection. I come, therefore, to the conclusion that he cannot be permitted to excuse the plaintiff from the obligation of the terms of the ticket, on any pretext that he did not actually read them so as to become aware of the actual conditions.

I am further of opinion that the plaintiff was bound by the conduct of her agent, and is precluded, under the circumstances, from setting up any defence that she did not deposit the luggage on the terms which the ticket so handed to her agent contained, or assent thereto.

On the second question I feel considerable hesitation. Assuming that the plaintiff assented, or is precluded from objecting that the deposit of the luggage was not made on the terms and conditions of the ticket in question, then arises the question whether or not, on the true construction of the terms and conditions of the ticket, the company undertake simply to warehouse the luggage for the convenience of the passengers, using the machinery of the luggage and cloak office as the office and place of business in which the matters relating to the deposit must be made and the ticket business transacted, or did they undertake to warehouse the articles left in their charge in the actual luggage and cloak office, so as to give to the person making the deposit, and paying the prescribed sum, the additional security which the actual deposit within the luggage and cloak office would afford? And it is to be observed that, the luggage and cloak office being locked up, except during the arrival and departure of trains, when a servant or servants would be present, and would probably prevent the access of strangers or thieves to the articles deposited, it may be said that the depositor might be

willing to pay for the accommodation offered, if accompanied by the additional security afforded by the cloak-room, and yet not be willing to assent to the conditions if the company were only to accept the responsibility of warehousing them generally.

Now, it is to be observed that the conditions on the face of them appear to apply in terms to "the warehousing passengers' luggage;" and, at the end of the condition upon which the defence upon this point rests, viz. the failure to declare the value and nature of the articles in question on the ground that they were beyond the value of 5*l.*, the sum, which by the condition was required to be paid on the value declared, is described to be "in addition to the before-mentioned *ordinary warehouse charges.*"

It was, however, contended that in the fourth condition it is said, the company will not be responsible for the loss of, or injury to, articles "except left in the cloak-room," and that those articles not being left in the "cloak-room," the conditions do not apply to the case. I cannot, however, but think that the true effect of that condition with the others really is to notify that, unless the articles have gone through the process of being ascertained, counted, and the fees duly paid at the luggage and cloak office, the company will not be responsible at all.

I have come, therefore to the conclusion that the limit of the company's undertaking was simply to warehouse the articles deposited on the conditions specified, and that they did not lose the benefit and protection of the conditions of the ticket, because the articles in question were not actually warehoused in the cloak room but were stolen from the vestibule.

I think, therefore, that the defendants are entitled to our judgment on both points.

BLACKBURN, J. The plaintiff was a passenger by defendant's railway, and arrived at the Paddington station in London with a portmanteau and a box, which she wished to leave in the custody of the defendants. Mr. Richard Harris, who acted for her, paid to the clerk of the defendants, at their cloak room, four pence, and received from him a ticket, on the terms of which much depends. He left the portmanteau and box in the custody of the defendants' servants; they put on them cloak-room labels, and left them without any other protection in the vestibule. A plan was admitted on the trial, and produced before us on the argument, which showed the position of the cloak room and the vestibule. The vestibule is a place to which passengers have access, and in which luggage in the custody of passengers may be placed by them. A thief, taking advantage of this, either removed or concealed the cloak-room tickets, treated the luggage as his own, and with an extreme of cool impudence, applied to the defendants' police-

man on duty to assist in removing them, which the policeman did. The thief was subsequently convicted, but only part of the property was recovered. Each package of Miss Harris's luggage was above the value of 5*l.*, and her loss was 60*l.*, and for this the action was brought.

At the trial, before my Brother Pollock without a jury, the above facts were admitted, and neither then nor on the argument before us was it disputed that the loss was occasioned in consequence of the servants of the defendants having failed to exercise proper care in and about the safe keeping of the luggage thus left with them. The defence was rested on the ground that the plaintiff was bound by the terms of the ticket, which, it was said, prevented the plaintiff from recovering for any loss to a package above the value of 5*l.* unless the value was declared and insurance paid at the rate of one penny per pound per day.

Mr. Richard Harris was called as a witness, and his evidence, as taken down on the judge's notes, was as follows :—"When I left the box and portmanteau my attention was not called to the conditions on the ticket, nor was I aware of them." Cross-examined : "I have been in the habit of travelling for many years, and during the last three years have left parcels at this cloak-room perhaps once a month when I came to town on business. I believe I have always, on those occasions, received a ticket similar to this. I was not aware of the conditions. I have probably seen conditions on the cloak-room tickets of other English railways. I believe I have seen printing on both sides of the Great Western tickets without reading them. I knew that I must deliver up the ticket when I wanted the articles deposited. I have seen the words on the ticket, 'This ticket to be given up when the luggage is taken away.'" Question : "Were you not aware it contained some conditions with reference to the deposit of the luggage although you were not aware what they were?" Answer : "I believed that there were some conditions." Re-examined : "My attention was not called to any condition, and I never gave it a thought. When I say I have always received a ticket similar to this I mean similar in general appearance." It was then admitted that the tickets used by defendants have for several years been the same as the ticket produced. The learned judge found for the plaintiff, 60*l.*, reserving leave to move to enter judgment for the defendants, the Court to draw inferences of fact.

The ticket (or rather a fac-simile of it) was produced on the argument of the motion before us.

Two questions were discussed. First, whether the plaintiff was, under the circumstances, bound by the terms of the ticket. Second, whether, on the true construction of those terms, they protected the defendants from liability for the loss, arising as this did. If either



question is decided in favor of the plaintiff, the verdict and judgment for her must stand. I have, however, come to the conclusion that both questions should be answered in favor of the defendants, who are therefore, in my opinion, entitled to judgment.

I will, first, give my reasons for thinking that the plaintiff was under the circumstances bound by the terms of the ticket.

The materials from which we are to draw inferences are, first, the evidence of Mr. Harris, which I accept as true, and do so the more readily because he describes himself as being in a state of imperfect information, which I think probably very common; and, secondly, the ticket which was produced before us. The appearance of the face of the ticket is material in deciding this first question. The conditions on the back only become material in deciding the second question. It was a paper about five and a half inches square, bearing the ordinary appearance of having been taken out of a book in which a counterfoil was left. The printed part was in clear, fair-sized type, such as any one might easily read. My Brother Mellor has, in his judgment, sufficiently stated its contents.

On the law governing this case, we were referred to the case of *Henderson v. Stevenson* (a), decided by the House of Lords sitting in appeal on a Scotch case, but on a subject in respect to which the law of Scotland and the law of England are one and the same. The Lords were there, in consequence of the forms of Scotch law, judges of fact, and we, in this case, are, in consequence of the manner in which the point is reserved, also judges of fact. I think that all inferior tribunals, and the Lords themselves on any subsequent occasion, are not only required to treat this decision with great respect as an authority, but are bound to follow it as a decision. If it is thought wrong, it must be altered by the legislature. And I make no distinction between the decision on the principle of law, as applicable to this case, and the principle on which the Lords drew the inference from the facts. I think the same inference should be drawn from the same facts, or facts which are in substance the same. But I think this is only true so far as the decision, or rather the ratio decidendi, of the House goes; and that opinions expressed by one or more of the Lords in delivering their opinions, if not part of the decision, are to be treated with great respect as authorities, but are not binding either on the House itself on a future occasion or on any other Court.

This, I think, was decided in *Mersey Docks v. Gibbs* (b). Lord Cottenham had, in *Duncan v. Findlater* (c), enunciated a doctrine which was in direct conflict with the opinion delivered by the judges in *Mersey Docks v. Gibbs* (b). The judges, after mentioning what Lord Cottenham's opinion was, say (d): "This is, no doubt, a very high author-

(a) Law Rep. 2 H. L., Sc. 470.

(b) 11 H. L. C. 686.

(c) 6 Cl. & F. 894.

(d) 11 H. L. C. at p. 720.

ity, being said by the Lord Chancellor in the House of Lords, though in a Scotch case, but, not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down." Lord Cranworth and Lord Wensleydale did not think it necessary to enter into details, and merely expressed their concurrence in the opinion delivered by the judges, thus deciding in contradiction to what Lord Cottenham had laid down in *Duncan v. Findlater* (a), without expressly saying anything about it. But Lord Westbury (b) thought it desirable "to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater* (a)." He then proceeds to express dissent from Lord Cottenham, and finally adds: "My Lords, the learned judges observed, and with very great correctness, that it is not everything that falls from a noble and learned lord in advising the House which is to be considered as the opinion of the House."

I call attention to this matter particularly, because I not only think myself bound to obey the decision of the House in *Henderson v. Stevenson* (c), but I also think (if I rightly understand the judgment) that, though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognized by the courts; and therefore I not only obey that decision, but acquiesce in it. But there are expressions used by the different Lords which seem to express opinions which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it.

On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord Holt in *Coggs v. Bernard* (d), the bailee (unless he is one who has the responsibilities of a public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury; the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other

(a) 6 Cl. &amp; F. 894.

(c) Law Rep. 2 H. L., Sc. 470.

(b) 11 H. L. C. at pp. 732—733.

(d) 2 Ld. Raym. 909; 1 Sm. L. C. 188, 7th Edit.

terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet in general he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke* (a) that is, if he "means his representation to be acted upon, and it is acted upon accordingly: or if, whatever a man's real intentions may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true." And accordingly, in *Allan v. Mawson* (b), where the plaintiff had taken an instrument which on a cursory view appeared to be a draft on Sir John Perring and others, bankers, London, but with the word "at" in very small letters inclosed in the hook of the S of the Sir, so as to make it at least doubtful whether the instrument did not purport to be a promissory note, Gibbs, C. J., asked the jury whether the word "at" was so inserted for the purpose of deception, for if so, it was to be struck out, and the instrument was a bill of exchange in fact. A similar decision, mentioned by Lord Hardwicke in 2 Atk. 32, had been come to by Lord Macclesfield in a case where a man gave a girl a promissory note for "20*l.*, value received, which I promise *never* to pay," and the word "never" was rejected. Both of those cases seem to me to proceed on the ground that in neither case could the defendant, as a reasonable man, believe that the other party had read the words inserted for the purpose of deceit, or that the other party meant to represent to the defendant that he had done so.

The decision in *Henderson v. Stevenson* (c) seems to me to proceed on the same principle, but to carry it one step further. There was no fraud or intentional deception found in that case, as there had been in the two just cited, but there was nothing to show that the steam-boat company, who were the defendants in that case, or those who represented them, as reasonable men, would believe, from the conduct of the passenger, that he had represented to them that he had read

(a) 2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119.

(b) 4 Camp. 115.

(c) Law Rep. 2 H. L., Sc. 470.

or looked at the back of the ticket, and in point of fact he had not.

Lord Cairns, L. C., says: "On the face of this ticket there are letters indicating the name of the steamboat company, and the words 'Dublin to Whitehaven.' This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him." He then points out that there was no reference on the face of the ticket to that which was printed on the back, and that the evidence was that the passenger had not, in fact, read what was on the back of the ticket, and proceeds: The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without anything dehors. Those who were satisfied to hand to the passenger such a contract, complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger, on his receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him." It certainly seems to me that this is, in other words, to say that, though the ticket was the contract, the passenger receiving such a ticket had not so conducted himself as to justify the steam packet company, or their servants, as reasonable men, in thinking that he had read, or ought to have read, or otherwise made himself acquainted with, what was on the back of the ticket, and consequently that the passenger was not precluded from showing that, in fact, he knew nothing of what was on the back. But, in the present case, the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and, that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to

its terms. I think he has so acted. It is true that Lord Chelmsford and Lord Hatherley, in *Henderson v. Stevenson* (a), are reported to have thrown out an opinion that the contract was complete on the payment of the passage money, and that the ticket was but a receipt for that money. This certainly is no part of the decision of the House, and, indeed, seems to be contrary to the view taken by the Lord Chancellor. I will not inquire at present how far what was suggested by those noble lords may or may not be just when applied to a passenger going by a public conveyance, which was the case before the House, but is not the case before us, and on which, therefore, we are not required to express an opinion; but, with every respect for their authority, I cannot think it applicable to the case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket which he knew was to be given up when the goods were demanded back. I think it would be as reasonable to allow the holder of a bill of lading, or of a wharfinger's receipt, or a dock warrant, to say that he thought this was only a receipt for the goods, and not a contract as to their carriage or custody. This, I think, cannot be allowed. I will not now inquire whether the question, whether the contract has been reduced into writing, is one of those preliminary questions which, according to *Bartlett v. Smith*, (b) are to be decided by the judge, or one of those to be decided by the jury. I did express an opinion in *Peek v. North Staffordshire Ry. Co.* (c) that it was for the judge. As we are both judges and jurors in this case, it is not necessary to inquire in which capacity we decide the question.

The defendants, as a railway company, are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this.

It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants, as reasonable men, in believing that the person bringing the goods and paying the money, as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket and to induce them to receive the goods on those terms? I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done

(a) Law Rep. 2 H. L., Sc. 470.

(b) 11 M. & W. 483.

(c) 10 H. L. C. 473, at pp. 517—518; 32 L. J. (Q. B.) 241, at p. 253.

nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody: see *Belfast and Ballymena Railway v. Keys (a)*. I think, as at present advised, the proper direction to a jury in such a case as this would be that, if they believed these undisputed facts, they ought to find that the terms were binding on the plaintiff. This we need not decide, but where I am to act as both judge and juror I have no hesitation in so finding.

The second question which arises depends entirely on the true construction of the conditions.

If I could agree with my Brother Lush that the meaning of the contract is that the defendants are to place the luggage in some separate warehouse to which none but the defendants or their servants had access, so that the placing them in the vestibule was a breach of contract, I should be inclined to agree in thinking that the defendants are liable to make good the loss arising from that breach of contract, on the principle of *Davis v. Garrett (b)*, that the plaintiff could not qualify his wrong; or, as I should prefer to enunciate the same principle, that the condition relieving them from liability for a loss applies to a loss occurring whilst they are carrying out the contract, not to one incurred when acting in violation of it. *Lyon v. Mells (c)* seems to me to proceed upon the ground that the condition exempting the owners of the lighter from liability for any loss, unless such loss was occasioned by negligence in the master and crew of the vessel, could not be construed as exempting them from loss occasioned by their own default, and seems to me not applicable to such a case as the present. Such was the construction put on that decision by Coleridge and Erle, JJ., in *Chippendale v. Lancashire and Yorkshire Ry. Co. (d)*, and I think, by the Court of Exchequer in *McManus v. Lancashire and Yorkshire Ry. Co. (e)*.

But in the present case I read the contract as being to keep safely, i. e. with reasonable and proper care in any way which to the defendants seemed best, and to deliver up the goods on the production of the ticket if brought at the proper office hours to the cloak-room. I do not think that depositing the luggage in the vestibule would have been any breach of contract, if the defendants had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place. They would, if these parcels were under the value of 5*l.*, be in my

(a) 9 H. L. C. 556. (b) 6 Bing. 716. (c) 5 East, 428. (d) 21 L. J. (Q.B.) 22.  
(e) 2 H. & N. 702; 27 L. J. (Ex.) 201; 4 H. & N. 327; 28 L. J. (Ex.) 353.

opinion liable, not because they placed them in the vestibule, but because they took no care of them when there. I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care, with, in effect, a proviso that inasmuch as the remuneration is very small and the loss may be very great, the defendants shall not be responsible for loss if the goods exceed 5*l.* in value, unless the value is declared and paid for. So construed, the condition protects the defendants in the present case.

This question is of much less importance than the first, as the conditions can easily be altered if the intention of the defendants is not expressed on them, but it would equally decide this particular case.

In my opinion the judgment ought to be for the defendants, and, as Mellor, J., agrees with me, the judgment of the Court will be for the defendants.

*Judgment for the defendants.*

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## BURKE v. THE SOUTH EASTERN RAILWAY COMPANY.

IN THE HIGH COURT OF JUSTICE, NOVEMBER 26, 1879.

[*Reported in 5 Common Pleas Division, 1.*]

Motion for judgment.

Action to recover damages for personal injury caused to the plaintiff through the negligence of the defendants.

The trial took place before Cockburn, C. J., and a jury, when it appeared that the plaintiff had taken from the defendants an ordinary cheap return ticket consisting of a small paper book with eight leaves. On the cover, or outer leaf, which formed the first page, was printed the number of the ticket, and the words, "South Eastern Railway Cheap return ticket. London to Paris and back. Second class. Available by night-service only. This ticket is available for 14 days, including the day of issue and expiry. Example. A ticket issued on the 1st of the month will be available for the return journey up to and including the 14th. Available for the return journey by the South Eastern or London, Chatham and Dover Railways." Inside the cover, that is to say, on the second page, statements were printed that "The cover without the coupons or the coupons without the cover, are of no value," and that "Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies . . ." The inside leaves were coupons, each of which was to be given up at a different stage of the journey. The plaintiff while travelling under this ticket on a railway in France was injured through the negligence of the railway

servants. He brought this action against the defendants, and gave evidence to the effect that, although he had often made the same journey with similar tickets, he had never read and did not know of the condition.

The defendants did not dispute the truth of his statement, but relied on the condition.

The learned judge directed the jury, that if it was brought to his notice it would be a defence, and adopting a form of question suggested by the Court of Appeal in *Parker v. South Eastern Ry. Co.* (a), asked the jury whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found that it was not, and gave their verdict for him with 250*l.* damages.

*McIntyre*, Q. C. (*Barnard*, with him), for the plaintiff. On the finding of the jury the plaintiff is entitled to judgment. *Henderson v. Stevenson* (b) is in point. There was in that case a contract on the face of a ticket, with no reference to a condition on the back, and the House of Lords held that the passenger who had not looked at the back was not bound by the condition. The judgment of Lord Cairns, C. (c) is conclusive in favor of the present plaintiff.

[LORD COLERIDGE, C. J. I thought that I followed *Henderson v. Stevenson* (b) in *Parker v. South Eastern Ry. Co.* (d) but that case was overruled by the Court of Appeal, where Bramwell, L. J., gave a judgment, based on reasoning which seems to me unanswerable, in favor of the defendants.

The condition must be brought to the traveller's notice. The Lord Justice agrees that if the question whether the plaintiff ought to have read the condition is one of fact it should be left to the jury, but, no doubt, suggests that it is a question of law. In *Parker v. South Eastern Ry. Co.* (d) the words "See back" were on the face of the ticket. Here, however, there was nothing to call the attention of the plaintiff to the condition on the inside of the cover. He did not read it and "was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased": see per Mellish, L. J., at p. 423. The contract was that he was to be carried to Paris and back and to deliver the coupons at the different stages of the journey.

[LINDLEY, J. *Harris v. Great Western Ry. Co.* (e) was a contemporaneous case, but decided contrary to *Parker's Case* (d).

LORD COLERIDGE, C. J. Both the Queen's Bench Division in the one case and the Court of Appeal in the other, while admitting the authority of *Henderson v. Stevenson* (b), distinguish it for various reasons].

(a) 2 C. P. D. 416. (b) Law Rep. 2 H. L. (Sc.) 470. (c) Law Rep. 2 H. L. (Sc.) 475.  
(d) 1 C. P. D. 618; 2 C. P. D. 416, at p. 426. (e) 1 Q. B. D. 515.



It governs the present case.

*Sir H. Giffard*, S. G. (*A. M. B. Bremner* with him) for the defendants was not heard.

LORD COLERIDGE, C. J., after stating the case and the terms of the ticket continued :—The defendants say that the injury complained of having happened in France, and beyond the limits of their own line, they are not responsible. *Prima facie* that would be a complete answer to the action, but the Lord Chief Justice, who tried the case, having before him various decisions of this and other Courts on the subject of the responsibility of railway companies when they issue printed contracts, took the opinion of the jury on certain points, one of which was, whether there was reasonably sufficient notice of this term of the contract given by the defendants to the plaintiff, and the jury found in the negative. For the purposes of this decision the jury may be taken to have found that the plaintiff did not know of the condition. Certainly there was no affirmative evidence to show that he had read or knew of this term. In my opinion it does not much matter which form of expression, viz., “term,” or “condition,” is used. I will take the finding of the jury most strongly against the defendants, and assume that the plaintiff was admitted not to have read and not to know of this condition, however improbable such a state of things was, and I will decide as if I believed it, whether I do or do not. The question is, Does that, under the circumstances, afford any defence? In my opinion it affords none. The contract, as I understand it, can only be this little book, and the whole of this little book. This is the contract, and these are the terms on which the defendants agreed to take the plaintiff to Paris and back, and in an ordinary case that would be conceded. But it is supposed that on this peculiar subject of railway passenger, the contrary has been decided by the decision of the highest tribunal. I should, of course, submit to follow the authority of the case of *Henderson v. Stevenson* (a), if it applied, whether I agreed with it or not, and should indeed have no power to do otherwise than to decide in accordance with it. It was attempted to assimilate this case to *Henderson v. Stevenson* (a), which shortly stated was this: There was a contract to take a passenger from Dublin to Whitehaven, and a condition printed on the other side. On the same side of the paper or card on which “Dublin to Whitehaven” was printed, there was no reference at all to what was printed on the other. It was admitted that if both sides were taken as the contract, the defendants were entitled to succeed, but it was said that one side only was to be taken as the contract, because there was no reference to the other side, and that the jury must be taken to have found that the plaintiff had a right to assume, and did assume, that the one side

(a) Law Rep. 2 H. L. (Sc.) 470.

contained the whole contract, and the terms on which he was agreeing with the defendants. That case was one of a bailment of luggage to the defendants for reward, and on the face of the paper there would arise an ordinary common law contract. The House of Lords held, in effect, that there was no evidence to show that any other than the common law contract had been entered into by means of that piece of paper. The decision is based on the view which the House of Lords took of the facts. The House of Lords assumed that the whole contract was contained on the one side of the one piece of paper. Now, if the House of Lords would have come to the conclusion that the contract in such a case as this was really limited by the first side of the first leaf of these pages their decision in *Henderson v. Stevenson* (a) would be binding on us. But I think the facts here are entirely different, and I see the widest distinction between the facts of the one case and the other. Here is a small book with many pages, and it is admitted that the whole of the leaves are, during the continuance of the contract, to be made use of, and the passenger cannot turn over the first sheet and make use of the first coupon without having under his eyes the condition on which the defendants rely. It cannot be contended that the first sheet forms the whole contract because it was admitted that the coupons form part of the contract. Then if the first page and all the coupons form part of the contract, on what ground is page two to be rejected? The defendants might fairly say: "This is the contract, we contract on no other terms than these, the plaintiff has taken this contract. Fraud is not suggested, and by the ordinary application of eyesight he might have seen the condition." The mere fact of his not choosing to read, or even of his not having read the term, which was not concealed from him, is no ground whatever for rejecting that any more than any other part of the contract. So, *bonâ fide* accepting and not presuming to doubt the authority of *Henderson v. Stevenson* (a) in cases brought within it by their facts, I am of opinion that this case, at least, is not within it. We are asked to say that the condition is not part of the contract, because there is not written in large letters at the bottom of the first page, "Read the next page." This in effect is the contention of the plaintiff. There is neither principle nor authority for such a proposition, and I think that the defendants are entitled to judgment.

LINDLEY, J. I am of the same opinion. The question depends entirely on the answer to the inquiry, What was the contract, if any, into which the parties entered? The only contract entered into was thus formed: the plaintiff paid a sum of money for a journey to Paris and back, and he received this ticket. The jury have not found what the contract was, the question was not put to them in that shape, but they may be assumed to have found that the plaintiff did not know

(a) Law Rep. 2 H. L. (Sc.) 470.

of the restrictive condition, and they have found that sufficient notice of it was not given to him. That leaves open the question what was the contract? Can the plaintiff make out a contract without that condition? I think it impossible for him to do so. If the jury had found that the contract was what was printed on the first page or on the coupons without the cover, the verdict would be so manifestly against the evidence that it could not stand. But they have not so found. I think that the answer to the question, What was the contract? is, "Here, in this small book, is the contract." The facts of *Henderson v. Stevenson*, *supra*, were different. On the face of the card in that case was, "Dublin to Whitehaven," and nothing else, and on the back a condition. The House of Lords, as it were, split it in two, and said there was room to find that the contract was what appeared on the face of the card. But it would be impossible to split this contract up. It does not admit of it. Its physical form is altogether different. On these grounds I think that the plaintiff is not entitled to judgment and that the defendants are, because the plaintiff cannot sue on a contract and ignore one of the terms.

*Judgment for the defendants.*

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### WATKINS v. RYMILL.

IN THE HIGH COURT OF JUSTICE, DECEMBER 18, 1882, JANUARY 16, 1883.

[Reported in 10 *Queen's Bench Division*, 178.]

RULE calling on the plaintiff to show cause why the verdict found for him in the Mayor's Court, London, should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

Dec. 18. *J. J. Sims*, showed cause.

*J. A. McLeod*, Q. C. (*C. Hall*, Q. C., and *Dickens*, with him), in support of the rule.

*Cur. adv. vult.*

The facts and arguments sufficiently appear in the judgment.

Jan. 16. The judgment of the Court (*Hawkins, J.*, *Stephen, J.* and *Watkin Williams, J.*), was delivered by

STEPHEN, J. This case was argued before my Brothers *Hawkins* and *Watkin Williams*, and myself, at the last Sittings, on a rule to show cause why the verdict found in the Mayor's Court for the plaintiff should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

The facts of the case were as follows: The plaintiff was the owner of a wagonette and the defendant was the keeper of a repository for the sale on commission of horses, carriages, and harness. On the 11th of May, 1878, the plaintiff took the wagonette to the repository and

left it to be sold, receiving for it a receipt on a printed form which was in these words: "Herbert Rymill's Royal Repository, Barbican, for the sale of horses, carriages, harness, &c. Sales by auction every Tuesday and Friday at 11. Received from —, *subject to the conditions as exhibited on the premises*" (these words were italicized). "The proceeds paid on Monday between the hours of eleven and four upon the production of the receipt signed by the owner, or forwarded by post if desired."

The conditions exhibited on the premises were printed conditions, exhibited in conspicuous positions in many parts of the premises. The following were the conditions bearing upon the present case:—

"10. Should any horse or other property sent to this repository remain over one month the proprietor shall be at liberty to sell the same by public auction only, with or without notice to the owner, unless all expenses are previously paid. All horses, carriages, carts, &c., sent to this repository for sale remain at the risk of the owner."

Amongst the terms were the following:—

"Two shillings and sixpence per week standing for four wheel carriages and Hansom cabs. . . . Two shillings and sixpence for washing each carriage.

"No horses or other property allowed to be taken away until the keep, sale, and other expenses are paid."

The plaintiff swore that he did not read the receipt, but put it in his pocket without noticing it. About a month after leaving the wagonette the plaintiff called and asked after it. He was told (but not so far as it appeared by the manager or by any person authorized to tell him) that the wagonette was sold, and that the settling day was Monday. He returned on Monday and saw the manager, who told him he must bring the receipt. He said he had lost it, but that they must have his name on their books. They refused to go into the matter without the receipt. The receipt was not found until the 25th of October, 1881, and during this time the plaintiff took no steps except calling two or three times to make inquiries. In November, 1881, the plaintiff through his solicitor applied for the wagonette, and found that it had shortly before been sold for 9*l.* 19*s.* 6*d.*, of which the whole except 6*s.* 10*d.* was due for charges under the terms stated in the conditions quoted. The defendant sent the plaintiff a post office order for 16*s.* 10*d.*, mistaking the amount of his charges, and thus considered himself to have overpaid him.

The defendant's counsel argued that the Common Serjeant, who sat as judge, ought to direct the jury on these facts to find for the defendant, but the Common Serjeant held that the question was one "for the jury whether the defendant had or had not given the plaintiff reasonable notice of the conditions." This question the jury answered in the negative, and gave a verdict for the plaintiff for 21*l.*

The question whether the direction given to the jury was correct depends upon a review of a variety of authorities which it is not altogether easy to reconcile. We will examine them in the order of their dates. Passing over earlier decisions which bear upon the subject indirectly, we may notice first the case of *Van Toll v. South Eastern Ry. Co.* (a), decided in 1862. In this case it was decided in substance that a person who deposited a bag at a cloak-room was bound by a notice printed on the back of a ticket which she received when she made the deposit and produced when she demanded the bag, which had been given to another person. In this case Erle, C. J., based his judgment for the defendants on the fact, amongst others, that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits. Willes, J., said (b): "Assuming that the plaintiff did not read the terms of the conditions, it is evident that she knew that they were there, and that she was satisfied to leave the goods upon those terms. The obvious result of this is that either she must be taken to have assented to the terms, or, if she did not assent, she knew that there were terms which the railway company intended to stipulate for."

The next is *Lewis v. McKee* (c). The facts of this case were dissimilar to the other, and need not be stated; but in the course of his judgment upon them, which was that of the Exchequer Chamber, Willes, J., restates the principle involved in *Van Toll v. South Eastern Ry. Co.* (a) in such a way as to imply (though he does not exactly state) that upon the delivery by one of two contracting parties to the other of a written document stating the terms on which the party who produces it proposes to contract, the other party acts at his peril if he does not read it.

The next case in order of time is *Zunz v. South Eastern Ry. Co.* (d) decided in 1869. In this case the railway company sought to protect themselves against liability for the loss of a passenger's luggage between Calais and Paris by a condition printed on a ticket to Paris exempting themselves from liability for losses off their own line. The Court of Queen's Bench were unanimously of opinion that the condition on the ticket was part of the contract, and Cockburn, C. J. (e), laid down the law as follows: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print on his ticket, which he only gets at the last moment after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get the ticket by the next comer—still we are bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and to be bound by them."

(a) 12 C. B. (N. S.) 75. (b) 12 C. B. (N.S.) at p. 87. (c) Law Rep. 4 Ex. 58.  
(d) Law Rep. 4 Q. B. 539. (e) Law Rep. 4 Q. B. at p. 544.

Cockburn, C. J., does not say to what authorities he referred: probably *Van Toll v. South Eastern Ry. Co.* and *Lewis v. McKee* (*supra*), would be two of them. They are the strongest cases in that direction which we have been able to find, though they do not appear to have been cited in the argument, which turned to a great extent upon other topics.

However this may be, the principle thus stated would be sufficient to decide this case if the decision stood alone. It is in some respects a stronger case against the defendant than the present one, as the power of railways to impose conditions on passengers is to a considerable extent limited by statutes which have no application to the case of repositories. There have, however, been several subsequent decisions which, though not inconsistent with *Zunz v. South Eastern Ry. Co.* (a), show that it cannot be regarded as a complete statement of the law.

The first of these which may be noticed is *Henderson v. Stevenson* (b), decided in 1875. In this case a passenger by a steamboat took a ticket on the face of which appeared the words "Dublin to Whitehaven." On the back were the words, "The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants or otherwise." There was no reference on the front of the ticket to the back of it, and the plaintiff swore that he did not look at it. It was held that the notice did not affect the company's liability. The facts of the case were so peculiar that it can hardly form a precedent for any other. It certainly does not appear that the steamboat company were guilty of fraud, but it does appear that they attempted to rid themselves of a common law liability by annexing to their contract to carry a condition most unusual in itself, and to which the course adopted by them would not naturally call the attention of the other party to the contract. The principle upon which the case was decided is expressed in a very few words by Lord Cairns (c), "The question does not depend upon any technicality of law or upon any careful examination of authorities. It is a question simply of common sense. Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? (the words "he is to be bound by those terms," or some equivalent, appear to have dropped out of the report). "It appears to me impossible that that can be held." It may be added that though the case was decided mainly on this ground, several of their Lordships, and in particular Lord Chelmsford and Lord Hatherley, entertained doubts as to the right of the defendants to attach such a condition as the one in question to the contract to carry. Lord Chelmsford says "that of course a person may if he chooses take the whole risk of the

(a) Law Rep. 4 Q.B. 539.

(c) Law Rep. 2 H. L. Sc. at p. 475,

(b) Law Rep. 2 H. L., Sc. 470.

voyage on himself, but the company by a mere notice without such assent can have no right to discharge themselves from performing what is the very essence of their duty."

The circumstances of the present case have an analogy to those of *Henderson v. Stevenson* (a). The notice was printed on the face of the receipt, and formed a prominent part of it. The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made, and it appears to us that by handing to the plaintiff the receipt in question the defendants called his attention to the subject as pointedly as if their clerk had said "Read this. It expresses the terms on which we are ready to take your wagonette."

The next case to be considered is *Harris v. Great Western Ry. Co.* (b), decided in 1876. In this case the luggage of a person who had been a passenger by the Great Western Railway was deposited by her brother on her behalf with the servants of the railway at the cloak-room, and the depositor received a ticket which on its face enumerated the articles received, stated the charge at 2*d.* for each, and ended with these words, "Left in the name of —, and subject to the conditions on the other side." On the back were conditions, one of which limited the liability of the company to 5*l.* for each package, unless a certain higher rate were charged. The person who deposited the articles said that he did not read the conditions on the back of the ticket, but admitted that he "believed there were some conditions."

The judges of the Queen's Bench Division held that the plaintiff was bound by the conditions on the back of the ticket. The judgment of Lord Blackburn in this case seems specially worthy of attention, though there was no difference of opinion in the Court.

Lord Blackburn elaborately distinguishes the case from *Henderson v. Stevenson* (a) on grounds similar to those which we have already stated. The shortest expression of his view is on p. 531. He there says that in *Henderson v. Stevenson* (a) there was nothing to show that the steamboat company would believe from the conduct of the passenger that he had represented to them that he had read or looked at the back of the ticket, and in point of fact he had not. In the following page Lord Blackburn states the reasons which led him to the conclusion that in the case then before him the plaintiff's agent, "by depositing the goods and taking this ticket, did so act as to assert to the defendants that he had looked at and read the ticket, and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms." One principal reason for this conclusion is as follows (c): "The defendants as a railway company are not bound to receive goods at all for custody ;

(a) Law Rep. 2 H. L., Sc. 470. (b) 1 Q. B. D. 515. (c) 1 Q. B. D. at p. 533.

they give notice that they will not receive them by any of their servants in general, but anyone wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this. It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants as reasonable men in believing that the person bringing the goods and paying the money as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket, and to induce them to receive the goods on those terms?"

It is obvious that, *mutatis mutandis*, every word of this would apply to the present case. The only remaining point in this case which requires notice is that Lord Blackburn observes: "I think as at present advised the proper direction to a jury in such a case as this would be that if they believed these undisputed facts they ought to find that the terms were binding on the plaintiff. This we need not decide, but where I am to act both as judge and juror," the Court had the power to draw inferences of fact, "I have no hesitation in so finding."

This case appears to us to be precisely in point in reference to the matter now before us, except as to the question whether the Common Serjeant ought to have directed a verdict for the defendant, as to which Lord Blackburn's expression of opinion is only a dictum. It is however necessary to refer to two other cases in order to show that they do not interfere with this view.

The first of these is *Parker v. South Eastern Ry. Co.*(a) which was decided in 1877. *Gabell v. South Eastern Ry. Co.* (a) was decided at the same time by the same judgment, the facts and directions given to the jury being identical in the two cases.

The facts in each case closely resembled those of *Harris v. Great Western Ry. Co.* (b). In each case a bag was left at a cloak-room, 2d, was paid and a ticket received, which had printed upon it the words "see back." On the back were conditions, of which one was, "The company will not be responsible for any package exceeding the value of 10l." Each plaintiff denied that he had read the words on the ticket or seen a printed notice to the same effect hung up in the cloak-room. In each case the judge asked the jury (1) Did the plaintiff read or was he aware of the condition? (2) Was the plaintiff under the circumstances under the obligation in the exercise of reasonable and proper caution, to read or make himself aware of the condition? In each

¶ (a) 2 C. P. D. 416.

(b) 1 Q. B. D. 515.



case the jury answered both questions in the negative. In each a rule for a new trial or for judgment was refused by the Divisional Court, and in each the case came before the Court of Appeal. Of the three judges who heard the case, Mellish, L. J., held, that there had been a misdirection, because the jury had not been asked whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition. Baggallay, L. J., was of the same opinion, though he expressed it somewhat differently, but each of these learned judges appears to have been of opinion that the importance to be attached and the effect to be given to a document of this nature must depend upon the character of the particular contract which it is alleged to constitute. As extreme cases, Mellish, L. J., suggests on the one hand the case of a turnpike ticket which a person driving through the gate on paying the toll would naturally not read, and on the other hand that of a bill of lading on which a person shipping goods would be held liable, although he might swear that he had never read it and did not believe it to contain conditions as to the terms of the contract of carriage. Lord Bramwell, then Lord Justice, took a view much more decisively in favor of the defendants. The case he said was precisely the same as if the defendant's servants had in so many words asked the plaintiffs to read the tickets, in which case as he says the plaintiffs would have to take the consequences if they did not read. "Why is there printing on the paper," he said, "except that it may be read?" The putting of it into their hands was equivalent to saying, "Read that?" "Could the defendants practically do more than they did." He sums up his judgment thus. "The defendants put into the hands of the plaintiff a paper with printed matter on it which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the plaintiff sees and must either read it and object to it if he does not agree to it, or if he does read it and not object or does not read it, he must be held to consent to it."

Lord Bramwell would upon these grounds have given judgment for the defendants, but he agreed that there ought at least to be a new trial. If the judgment of Lord Bramwell in *Parker v. South Eastern Ry. Co.* (a) is accepted it appears to us to be an authority directly in point in favor of the defendants in the present case, but the other two judges took a somewhat different view of the subject, and Mellish, L. J., suggested the question which he considered proper for the jury. This question differs considerably from the one actually put by the Common Serjeant in this case. It is one thing to ask whether a defendant has done what is reasonably sufficient to give the plaintiff notice of a condition, and quite another to ask (as the Common Serjeant did) whether he has given him reasonable notice.

The latest case on the subject, and the last which we need notice,

is *Burke v. South Eastern Ry. Co. (a)*, decided in 1879. In this case the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was "Cheap return ticket London to Paris and back, second class," and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition and did not know of it. Cockburn, C.J., asked the jury the question suggested in *Parker v. South Eastern Ry. Co. (supra)*, and they answered it in favor of the plaintiff. The defendants moved to have judgment entered for them and this was done, the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this case can hardly be supported by any principle short of that laid down in *Zunz v. South Eastern Ry. Co. (b)*, if indeed it does not go further.

Such being the state of the authorities, the question is how they bear on the case now to be decided. In a few words the matter appears to us to stand thus.

The cases relevant to the matter are in order of date: *Zunz v. South Eastern Ry. Co. (b)*; *Harris v. Great Western Ry. Co. (c)*; *Parker v. South Eastern Ry. Co. (supra)*; and *Burke v. South Eastern Ry. Co. (a)*. All of them are in favor of the defendant except *Parker v. South Eastern Ry. Co. (supra)*, and of the three judgments in this case that of Lord Bramwell is directly in the defendants' favor. To a certain extent the judgments of Mellish and Baggallay, L. J., are in favor of the plaintiff, as they treat the question whether reasonable means to give notice were employed by the defendants as one of fact for the jury, though in another way they are unfavorable as they suggest as the question for the jury one which in this case was not put to them. It must be remembered that the precise question before the Court in *Parker v. South Eastern Ry. Co. (supra)* was not whether the question in that case was one of law or of fact, but whether the questions put to the jury by the learned judges at *Nisi Prius* were proper, which, as all the Court agreed, they were not.

It must also be observed that in *Parker v. South Eastern Ry. Co. (supra)*, the question before the Court related to the common law contract of the bailment of goods for safe custody, the nature of which is well known in the absence of special terms agreed to by the parties. The present case relates to a contract of a different kind, namely, the deposit of an article for sale on commission, as to which the terms must necessarily depend upon the agreement of the parties, as none are ascertained by the common law. Besides all the judges in *Parker v. South Eastern Ry. Co. (supra)*, agreed that the effect of the delivery of

(a) 5 C. P. D. 1.

(b) Law Rep. 4 Q. B. 539.

(c) 1 Q. B. D. 515.

a document stating terms must depend on the nature of the contract to which it related.

We now proceed to state the principles which we deduce from this examination of the authorities and to apply them to the case before us. Thrown into a general form the result of the authorities considered appears to be as follows: A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule however there are a variety of exceptions.

(1.) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception may be found in the judgments in *Parker v. South Eastern Ry. Co.* (a), and in the language of some of the Lords in *Henderson v. Stevenson* (b), though these must be received with caution for reasons given by Lord Blackburn in his judgment in *Harris v. Great Western Ry. Co.* (c).

(2.) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document.

(3.) A third exception occurs, if, without being fraudulent, the document is misleading and does actually mislead the person who has taken it. The case of *Henderson v. Stevenson* (b) is an illustration of this.

(4.) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgment in *Parker v. South Eastern Ry. Co.* (a). One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case.

We now come to apply these principles to the case before us. It is obviously within the general rule. Can it be brought under any of the exceptions? The only one which can apply to it is the one which we have put first. Can it be said that the nature of the transaction

(a) 2 C. P. D. 416.

(b) Law Rep. 2 H. L., Sc. 470.

(c) 1 Q. B. D. 515.

was such that the plaintiff might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms.

It seems to us impossible to suppose that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the common law in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract of lease or a bill of lading, and this consideration alone seems to us to establish the conclusion that the receipt and conditions to which it refers constituted the contract between the parties, and that the learned Common Serjeant misdirected the jury when he told them that the question was whether the defendant had given reasonable notice to the plaintiff of the conditions. We may observe that in no view of the case could this direction be upheld. If any question at all were asked it ought to have been whether the defendant took reasonable means to give notice of the conditions to the plaintiff, which is a very different one from that which was actually put to the jury.

This brings us to the last question in the case. Ought we to enter a verdict for the defendant or to send the case back for a new trial in order that the question suggested by Mellish, L. J., may be put? We think that we ought to enter judgment for the defendant. The question suggested by Mellish, L. J., may be proper in cases falling under what we have called the first exception to what we apprehend to be the general rule, but this, in our judgment, is not one of those cases. It resembles rather the cases of *Zunz v. South Eastern Ry. Co.* (a) and *Burke v. South Eastern Ry. Co.* (b), in which the ticket itself was held to be the contract. It is in some cases difficult to say what is a question of law and what is a question of fact, but in this case a test may be applied which to us seems conclusive. Suppose that the case were sent for a new trial and that the jury, on the undisputed facts, were to find that the defendant had not taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being in direct opposition to the evidence? as being a verdict which, upon the evidence, no intelligent men could justly return? We think it would, and that being so, it seems to follow that the question is one of law and not of fact. It is, in one sense, a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law. This may be shown by stating it specifically. The only question which can be called a question of fact is, whether giving a man a printed paper plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission is or is not

(a) Law Rep. 4 Q. B. 539.

(b) 5 C. P. D. 1.

equivalent to asking the owner of the carriage to read that paper, with intent that he should read it when he has a fair opportunity of doing so. This, we think, is a question of law, to be answered in the affirmative.

As the result, the verdict and judgment for the plaintiff for 21l., will be set aside, and the verdict entered for the defendant, with costs.

*Judgment for the defendant.*

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### WEEK v. TIBOLD.

IN THE KING'S BENCH, TRINITY TERM, 1605.

[*Rolle's Abridgement*, 6.]

IF there be a communication between A's father and B respecting a marriage to be had between A and the daughter of B, and B then affirms and declares (*affirme and publish*) to A's father that he, B, will give to the man who marries his daughter with his consent £100, and A afterwards marries B's daughter with his consent; yet this affirmation and declaration of B does not raise a promise on which an action of assumpsit can be maintained, for the words spoken do not include any promise.

Yelverton, in a note of this case (a), gives as one of the grounds of the decision, "it is not reason that the defendant should be bound by such general words, spoken to excite suitors."

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### TAYLOR AND ANOTHER, ASSIGNEES OF WALSH,—A BANKRUPT, *against* BREWER AND OTHERS.

IN THE KING'S BENCH, MAY 8, 1813.

[*Reported in 1 Maule and Selwyn*, 290.]

ASSUMPSIT to recover a compensation for work done by the bankrupt. The defendants composed a committee for the management of the sale of lottery tickets, and the bankrupt was employed in going backwards and forwards upon their business. The plaintiffs founded their claim to compensation on the following resolution of the committee: 4th January, 1810, at a meeting, &c., present, Brewer etc., Resolved, that any service to be rendered by Walsh shall after the third lottery be *taken into consideration, and such remuneration be made as shall be deemed right*. Lord Ellenborough, C.J. was of opinion at the trial, that under this resolution it was optional in the committee to remunerate the bankrupt or not, according as they should think right, and therefore nonsuited the plaintiffs.

(a) Yelv. 11.

*Park* moved to set aside the nonsuit, on the ground that the bankrupt was entitled to some recompense; inasmuch as an agreement with a person that he should do work, and should have what is right for it, did not import that he should have nothing for his trouble if his employer should be so minded, but that he should have a reasonable reward: it should have been left therefore to the jury to consider what was reasonable, as was done in *Peacock v. Peacock* (a).

LORD ELLENBOROUGH, C. J. In that case the defendant expressly told the plaintiff that he should have a share in the business, leaving only unsettled what particular share he was to have: but here, I own it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted; and the same thing does not unfrequently happen in contracts with several of the departments of government.

GROSE J. I consider the resolution to import that the committee were to judge whether any or what recompense was right.

LE BLANC, J. It seems to me to be merely an engagement of honor.

BAYLEY, J. The fair meaning of the resolution is this, that it was to be in the breast of the committee whether he was to have anything, and if anything, then how much.

*Rule refused.*

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## WINN v. BULL.

IN THE HIGH COURT OF JUSTICE, NOVEMBER 19, 1877.

[ *Reported in 7 Chancery Division, 29.* ]

ON the 16th of March, 1877, the Plaintiff and Defendant entered into and signed the following agreement for a lease of a freehold house belonging to the Plaintiff:—

“An agreement entered into between William Winn (the Plaintiff) of the one part, and Edward Bull (the Defendant) of the other part: whereby the said William Winn agrees to let and the said Edward Bull agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as ‘Westwood,’ situate in the Avenue, Southampton, as the same were lately in the occupation of Mrs. Sullivan, at the yearly rent of £180, the first year’s rent to be allowed to the said Edward Bull and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract.”

(a) 2 Camp. N. P. C. 45.

No formal or other contract was ever entered into between the parties.

The Plaintiff's solicitor subsequently sent the Defendant's solicitor a draft of the proposed lease containing covenants on the part of the Defendant to keep the premises in repair.

The Defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the Plaintiff insisting that the lease should remain substantially in its original form, whereas the Defendant contended that its terms were contrary to the intention of the agreement, and he ultimately refused to take a lease at all. The Plaintiff thereupon brought this action, claiming specific performance of the agreement.

In his statement of defence the Defendant relied upon the Statute of Frauds, alleging that the agreement was conditional only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The Plaintiff then joined issue, and the action now came on for trial.

*Chitty* Q.C., and *Jolliffe*, for the Plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner. They referred to *Rossiter v. Miller* (a), *Crossley v. Maycock* (b), and *Chinnock v. Marchioness of Ely* (c).

*Roxburgh*, Q.C., and *Maidlow*, for the Defendant, were not called upon.

JESSEL, M.R.:—

I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favorable to specific performance. When a man agrees to buy an estate, there are a great many more stipulations wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract

(a) 5 Ch. D. 648.

(b) Law Rep. 18 Eq. 180.

(c) 4 D. J. & S. 638.

was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent Act of Parliament—the *Vendor and Purchaser Act*, 1874—no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shows that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term “usual covenants.” It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the Plaintiff says in effect, “I agree to grant you a lease on certain terms, but subject to something else being approved.” He does not say, “Nothing more shall be required beyond what I have already mentioned,” but “something else is required” which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

I will take only one of them, *Chinnock v. Marchioness of Ely* (a). There Lord Westbury says (b): “I entirely accept the doctrine... that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.” Then he goes on, “But if to a proposal or offer an assent be given subject to a provision as to a

(a) 4 D. J. & S. 638.

(b) 4 D. J. & S. 645, 646.



contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

That judgment of Lord *Westbury's* did not require any approval, but it was approved of by the Court of Appeal in *Rossiter v. Miller* (a).

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the Defendant.

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### HYDE v. WRENCH.

IN CHANCERY, DECEMBER 8, 1840.

[*Reported in 3 Beavan, 334.*]

THIS case came on upon general demurrer to a bill for specific performance, which stated to the effect following:—

The defendant, being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for 1,200*l.*, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me 1,200*l.* for my farm; I will only make one more offer, which I shall not alter from; that is, 1,000*l.* lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant 950*l.* for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and, the instant I receive his reply, will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the 950*l.* for the purchase on the 26th of June; and on the

27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows : " I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of 950*l.* for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm ; viz. 1,000*l.* through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the defendant " returned a verbal answer to the last-mentioned letter, to the effect he would see his solicitor thereon ; " and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. *Kindersley* and Mr. *Keene* in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v. Eyre* (a). The plaintiff, instead of accepting the alleged proposal for sale for 1,000*l.* on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. *Pemberton* and Mr. *Freeling*, contra. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there therefore exists a valid subsisting contract. *Kennedy v. Lee* (b), *Johnson v. King* (c), were cited.

*The MASTER of the ROLLS.*

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for 1,000*l.*, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that the plaintiff made an offer of his own to purchase the property for 950*l.* and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that therefore there exists no obligation of any sort between the parties; the demurrer must be allowed.

(a) 2 Sim. & St. 194.

(b) 3 Mer. 454.

(c) 2 Bing. 270.

## COOKE v. OXLEY.

IN THE KING'S BENCH, MAY 14, 1790.

[Reported in 3 Term Reports, 653.]

THIS was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, etc. a certain discourse was had, etc. concerning the buying of two hundred and sixty-six hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said two hundred and sixty-six hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day*; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant *to deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, etc.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise,

*Erskine* and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o'clock, yet, not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

Lord KENYON, Ch. J. (stopping Bearcroft, who was to have argued in support of the rule): Nothing can be clearer than that, at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*.

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was first made. Then, as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time

when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise.

*Rule absolute (a).*

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## OFFORD v. DAVIES AND ANOTHER.

IN THE COMMON PLEAS, JUNE 2, 1862.

[Reported in 12 Common Bench Reports, New Series, 748.]

THIS was an action upon a guaranty. The first count of the declaration stated, that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following, that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of 600*l*. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys." Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, &c.; yet that the defendants broke their said promise, and did not pay to the plaintiff, or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective

(a) This judgment was affirmed in the Exchequer Chamber; M. 32 G. 3.

sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonored as aforesaid, became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys, if the said bills had been duly paid at maturity.

Fourth plea, to the first count,—so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange, and the said sums so advanced,—that, after the making of the said guaranty, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guaranty, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred; the ground of demurrer stated in the margin being “that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guaranty [for a definite period] has no power to countermand it without the assent of the person to whom it is given.” Joinder.

*Prentice* (with whom was *Brandt*,) in support of the demurrer. A guaranty like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received?] For any thing disclosed by the plea, the plaintiff might have altered his position in consequence of the guaranty, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. In *Calvert v. Gordon*, 1 M. & R. 497, 7 B. & C. 809, 3 M. & R. 124, it was held that the obligor of a bond conditioned for the faithful service of A. whilst in the employ of B., cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such a notice. Lord Tenterden, in giving judgment in that case, says (3 M. and R. 128): “The only question raised by the defendant’s second plea is, whether it is competent to the surety to put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship on the surety if this liability must necessarily continue during the whole time that the principal remains in his service; but, looking at the instrument

itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time, after notice given. This he has not done." Here, the defendants *have* stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [BYLES, J. Suppose a man gives an open guaranty, with a stipulation that he will not withdraw it,—what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract. *Hassell v. Long*, 2 M. & Selw. 363, is an authority to the same effect as *Calvert v. Gordon*. In Pothier on Obligations, Part II. c. 6, § 7, art. 2, p. 442, it is said, "When the obligation to which a surety has acceded must from its nature exist a certain time, however long it may be, the surety cannot within that time demand that the principal debtor should discharge him from it; for as he knew, or ought to know, the nature of the obligation to which he acceded, he should have reckoned upon continuing obliged during the whole of the time." Again, Part III. c. 6, art. 4, p. 635: "Regularly, lapse of time does not extinguish obligations: persons who enter into an obligation oblige themselves and their heirs until the obligation is perfectly accomplished. But there may be a valid agreement that an obligation shall only continue to a certain time. For instance, I may become surety for a person upon condition that my undertaking shall not bind me after the expiration of three years."

*E. James, Q. C.* (with whom was *T. Jones*), *contra*. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. This is more like the *mandatum pecuniæ credendæ* treated of by Pothier—on Obligations, Part II. c. 6, § 8, art. 1. If so, it is subject to all incidents of a mandate or authority. [WILLES, J. *Mandatum* does not mean a bare authority which may be revoked.] In Story on Agency, the learned author, having stated in § 463 that "in general, the principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure," proceeds in § 464: "The Civil law contained an equally broad doctrine. *Si mandavero exigendam pecuniam, deinde voluntatem mutavero, an sit mandati actio vel mihi, vel hæredi meo? Et ait Marcellus, cessare mandati actionem, quia extinctum est mandatum, finita voluntate*. The same principle has infused itself into the juris-

prudence of modern Europe, as, indeed, it could not fail to do, since it is but an application of a maxim founded upon the natural rights of men in all ages, in regard to their own private concerns, where the law has not interfered to prohibit the exercise of them." "But," § 466, "let us suppose that the authority has been in part actually executed by the agent; in that case, the question will arise whether the principal can revoke the authority, either in the whole or as to the part which remains unexecuted. The true principle would seem to be, that, if the authority admits of severance, or of being revoked as to the part which is unexecuted, either as to the agent or as to third persons, then and in such case the revocation will be good as to the part unexecuted, but not as to the part already executed." A mutual agreement to rescind can only be necessary where there is a mutual contract. But in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co., of Newtown, had become notoriously insolvent, would the defendants continue bound by their guaranty, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J. Suppose I guarantee the price of a carriage, to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guaranty?] Not after the coach-builder has commenced the carriage. [ERLE, C. J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] In an American work of considerable authority, Parsons on Contracts, p. 517, it is said, "A promise of guaranty is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract, enforceable at law, to deliver the residue." *Brocklebank v. Moore*, cor. Abbott, C. J., Guildhall Sittings after Trinity Term, 1823, referred to in 2 Stark. Evid., 3d edit. 510, n., is a direct authority that "a continuing guaranty is countermandable by parol."

And the same principle is clearly deducible from *Mason v. Pritchard* 12 East, 227. [WILLIAMS, J. That would have been applicable, if this had been a guaranty for 600*l.*, with no mention of the twelve calen-

dar months.] The mention of twelve months would not compel the plaintiff to go on discounting for that period. In *Holland v. Teed*, 7 Hare, 50, under a guaranty given to a banking house consisting of several partners, for the repayment of such bills drawn upon them by one of their customers as the bank might honor, and any advances they might make to the same customer, within a certain time, it was held that the guaranty ceased upon the death of one of the partners in the bank before the expiration of the time to which the guaranty was expressed to extend; that bills accepted before the death of the partner, and payable afterwards, were within the guaranty; and that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act. [BYLES, J. The case of a change in the firm is now provided for by the Mercantile Law Amendment Act, 19 and 20 Vict. c. 97, § 4. ERLE, C. J. What meaning do you attribute to the words "at our request" in this guaranty?] As and when we request. The notice operated a retraction of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

*Brandt*, in reply. The Court of Exchequer have decided in this term in a case of *Brandbury v. Morgan*, that the death of the surety does not operate a revocation of a continuing guaranty. If that be so, it is plain that the guaranty is not a mere *mandatum*, but a contract. In *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, the executrix of the deceased surety gave notice to Calvert & Co., the obligees, that she would no longer consider herself liable on the bond; but the Vice-Chancellor (Sir L. Shadwell) said, that, "by the original contract, the liability of the surety was to continue as long as Calvert & Co. kept Richard Edwards, or he chose to remain in their service; that after Calvert & Co. had received the plaintiff's letter they never gave her any intimation that they did not consider her as continuing liable under her husband's bond; that their conduct did not operate in any manner upon her; and that therefore the injunction ought to be dissolved." That shows that, in the opinion of that learned Judge, the assent of the three persons concerned and interested in the bargain would be requisite to its dissolution. The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. [*T. Jones*. The fact undoubtedly is so.]

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court (a).

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defendants discount

(a) The case was argued before Erle, C. J., Williams, J., Willes, J., and Byles, J.



bills for Davies & Co., not exceeding 600*l.*, the defendants promised to guarantee the repayment of such discounts *for twelve months*, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raised the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that, consequently, the plea is good.

This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guaranty for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that the same discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more.

*Judgment for the defendants.*

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## ROUTLEDGE v. GRANT.

IN THE COMMON PLEAS, MAY 13, 1828.

[*Reported in 4 Bingham, 653.*]

**ASSUMPSIT.** The declaration stated (first count) that the plaintiff was possessed of a term in a dwelling-house, to expire 25th December, 1856; and that defendant agreed, on the 29th April, 1825, upon receiving a lease for twenty-one years, at 250*l.* a year rent, with the option of having the time extended to thirty-one years on giving six months' notice, and upon having possession on the 25th July then next, to pay plaintiff 2,750*l.*, and take the fixtures at a valuation.

Averment of plaintiff's readiness to grant the lease. Breach; refusal to accept it, and to take the fixtures at a valuation; and non-payment of the 2,750*l.*

The second count alleged the plaintiff to be entitled to a certain term, to wit, a term of thirty-two years, in the dwelling-house, under a certain contract between the plaintiff and Anthony Hermon, who

was authorized in that behalf; and then stated the agreement with the defendant, and the breach, as before.

The third count alleged plaintiff to be possessed for the residue of a certain term, to expire 25th December, 1856; and the agreement, tender of lease to defendant, and breach, as before.

At the trial before Best, C. J., London Sittings after Michaelmas term, it appeared that, on the 18th March, 1825, the plaintiff received a note from the defendant touching the premises in these terms:—

**MR. GRANT'S PROPOSAL.**

To pay a premium of 2,750*l*, upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years.—Rent, 250*l*.

Mr. Grant to pay for the fixtures at a valuation, possession to be given on or before 25th July next, to which time all taxes and outgoings are to be discharged by Mr. Routledge; and a definitive answer to be given within six weeks from the 18th March, 1825.

The plaintiff, who at this time had only a term of twelve years in the premises, had to apply to his landlord for a new lease before he was in a condition to accept the defendant's offer. The plaintiff, having come to an understanding with his landlord, wrote the following note to the defendant:—

Mr. Routledge begs to say that he accepts Mr. Grant's offer for his house, No. 59 St. James's Street, and that he will give Mr. Grant possession on the 1st of August next.

St. James's Street, 6th April, 1825.

Mr. R. will esteem it a particular favor if Mr. Grant will not, for the present, name the subject to any one.

The defendant returned the following answer:—

7th April, 1825.

SIR,—I received your note last night, and hasten to acquaint you, that, having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but upon consulting with a friend this morning, in whose opinion I had more confidence than my own, I am advised, for some reasons which had not occurred to myself, not to think of taking a house in St. James's Street for a dwelling-house. May I therefore request you to permit me to withdraw the proposal I made to you about it? I am in hopes you will make no hesitation to do this, when you consider the spirit of candor and openness in which it was made to you. But should it be otherwise, as I am the last that would willingly act with inconsistency, I will

willingly refer the question to friends for decision, and abide by their opinion of the case.

I have the honor to be, &c.,  
ALEX. GRANT.

MR. THOMAS ROUTLEDGE.

To this the plaintiff replied as follows :—

8th April, 1825.

SIR,—In answer to your letter of yesterday, I beg to state, that relying upon your performing the agreement for the purchase of my house in St. James's Street, I have taken another house, and made arrangements which I cannot, without great loss, relinquish. I hope, therefore, that you will not wish me to withdraw it.

I am, &c.,  
THOS. ROUTLEDGE.

ALEXANDER GRANT, Esquire.

The defendant rejoined :—

9th April, 1825.

SIR,—Your note of yesterday surprised me, being altogether at variance with your conversation with me two or three hours previous to your note, dated on the evening of 6th, in which, you must recollect, you one moment declared yourself off; and, finally, you went away to have the opinion of Mrs. Routledge about the answer you were to send me. How therefore you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add that you may proceed with your claim for "loss and inconvenience," as you may think most advisable.

I am, &c.,  
ALEX. GRANT.

MR. THOMAS ROUTLEDGE.

The plaintiff, after this, surrendered the existing lease to his landlord, and obtained from him a new one, dated 21st April, 1825, from the 25th December, 1824, for thirty-two years, for the same clear yearly rent of 250*l.*, payable quarterly; in which the covenants on the part of the lessee were similar to those in the former; and then wrote the defendant the following letter :—

SIR,—Upon referring to my letter to you of the 6th inst., accepting your offer for my house, No. 59 St. James's Street, I perceive that I, by mistake, stated that I would give possession on the 1st day of August next. By your offer, you state that possession is to be given

on or before the 25th July next ; and I inform you that I am ready to give you possession, according to your proposal.

29th April, 1825.

I am, &c.,  
THOS. ROUTLEDGE.

This letter, on the day it was dated, was delivered at the defendant's house ; and the keys, and a lease of the premises in question, according to the agreement, were tendered to him before the 25th July, but rejected.

The six weeks, from the 18th March, 1825, within which, by the defendant's proposal, a definitive answer was to be given, expired on the 1st May, 1825.

Upon these facts it was objected, first, that the plaintiff being allowed six weeks to accept or reject the defendant's offer, the defendant was entitled also, until it was accepted, to retract it, at any period before the expiration of the six weeks ; that there was no acceptance of the terms proposed till the 29th of April, which came too late, the defendant having retracted his proposal on the 9th. Secondly, that the plaintiff had not, before the defendant withdrew his proposal, any such interest in the premises as he was alleged to have in the declaration, or as would have enabled him to accede to that proposal. The plaintiff was thereupon nonsuited, with leave to move the Court to set the nonsuit aside.

*Taddy*, Serjt., accordingly obtained a rule *nisi* to set aside this nonsuit, and

*Wilde*, Serjt., showed cause. There was no valid contract binding on both parties. By the terms of the defendant's proposal, the plaintiff had six weeks to accept or reject it, and the parties would not have been on an equal footing if the defendant had not the privilege of withdrawing his proposal during the same period : having finally withdrawn it on the 9th of April, the plaintiff's acceptance on the 29th came too late, the acceptance of the 6th being out of the question as not acceding to the terms offered by the defendant. *Kennedy v. Lee* (a), has decided that an acceptance varying in any degree from the terms of an offer is in effect no acceptance ; and *Adams v. Lindsell* (b) confirms the principle established in *Cooke v. Oxley* (c), that a party who allows time for the acceptance of an offer may retract before it is accepted. But the plaintiff, at the time of the defendant's offer and up to the period of his withdrawing it, had no such interest in the premises as that stated in the declaration, nor even such as could have enabled him to meet the proposal ; he had only a term of twelve years when he agreed to grant thirty-one. On the ground of variance, therefore, the nonsuit cannot be impeached.

*Taddy* and *Jones*, Serjts., in support of the rule. The defendant's

(a) 3 Meriv. 454.

(b) 1 B. & A. 681.

(c) 3 T. R. 653.

offer was made on good consideration ; namely, that the plaintiff should procure him a term of thirty-one years in the premises ; and a party cannot retract, during the time which he allows for deliberation, an offer made on good consideration. *Cooke v. Oxley* was determined on the ground that the bargain was *nudum pactum*, and therefore without consideration. Lord Kenyon said, " At the time of entering into the contract the engagement was all on one side ; the other party was not bound ; it was, therefore, *nudum pactum*." And Buller, J., put it on the ground that it ought to have been stated that the defendant (who was allowed till four o'clock to consider whether or not he would buy goods on the terms offered) " did agree at four o'clock to the terms of the sale : " from which it may be inferred that if such a statement had been made in the declaration and proved, the defendant would have been liable for refusing to perform his contract. In the present case there is a sufficient consideration, and a sufficient averment and proof of the plaintiff's agreeing to the terms of the contract before the expiration of the time limited. In *Adams v. Lindsell* the defendants were held to be bound by an offer to sell upon receiving an answer in course of post, although, by accident, the answer did not arrive till two days after the next post, and the defendants had, in the mean time, sold the goods to a third person.

With respect to the alleged variance,—it is sufficient that the plaintiff had a term at his disposal ; the time when it was to expire was immaterial, and the allegation that it was to expire in 1856 may be rejected as surplusage. . . .

It is sufficient if the party has at the time of the completion of the contract, that which he proposes to sell. And on the 29th of April, before which time there was no complete contract in the present case, the plaintiff was in possession of the term he agreed to dispose of.

BEST, C. J. The nonsuit was right on both grounds. I put it on the same footing as I did at *Nisi Prius*. Here is a proposal by the defendant to take property on certain terms ; namely, that he should be let into possession in July. In that proposal he gives the plaintiff six weeks to consider ; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. This was expressly decided in *Cooke v. Oxley*, where the defendant proposed to sell, at a certain price, tobacco to the plaintiff, who desired to have till four in the afternoon of that day to agree to or dissent from the proposal ; with which terms the defendant complied ; and the plaintiff having afterwards sued him for non-delivery of the tobacco, Lord Kenyon put it on the true ground, by saying, " At the time of entering into this contract the engagement was all on one side ; the other party was not bound." Buller, J., said, " It has been argued that this must be taken to be a complete sale

from the time the condition was complied with: but it was not complied with; for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." I put the present case on the same ground. At the time of entering into this contract the engagement was all on one side. In *Payne v. Cave* (a) it was holden that the defendant, who had bid at an auction, might retract his bidding any time before the hammer was down, and the Court said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

These cases have established the principle on which I decide; namely, that till both parties are agreed, either has a right to be off. The case of *Adams v. Lindsell* is supposed to break in on them; but I think it does not, because the Court put it on the circumstance that the offer was made by the post, and say, "If the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." If they are to be considered as making the offer till it is accepted, the other may say, "Make no further offer, because I shall not accept it;" and to place them on an equal footing, the party who offers should have the power of retracting as well as the other of rejecting: therefore I cannot bring myself to admit that a man is bound when he says, "I will sell you goods upon certain terms, receiving your answer in course of post." However, it is not necessary to touch that decision, for the reasoning of the Court coincides with the principle on which we now determine. As the defendant repudiated the contract on the 9th of April, before the expiration of the six weeks, he had a right to say that the plaintiff should not enforce it afterwards.

But upon the question of variance, we are all of opinion that none of the counts apply. It is not necessary, perhaps, that the termini of the plaintiff's lease should be set out with precision; but the

(a) 3 T. R. 148.

variance is fatal if the plaintiff has not, at least, an interest which will enable him to perform his contract. The variance is not in words, but in substance. The plaintiff had no such term as that stated in the first and third counts. In the second, he states he had a contract for a lease;—such a contract, to be valid, must be in writing, and he cannot be said to have had it unless he had it in writing. But there was no evidence of any such contract; and, therefore, upon both grounds, the rule must be discharged.

BURROUGH, J. (*a*), coincided in discharging the rule on the ground of variance.

GASELEE, J. If this case has rested on the first point, I should have wished for time to consider it; but on the ground of variance, I have no doubt that this rule must be  
*Discharged.*

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RAMSGATE VICTORIA HOTEL COMPANY LIMITED  
v. MONTEFIORE.

SAME v. GOLDSMID.

IN THE EXCHEQUER, JANUARY 17, 1866.

[*Reported in Law Reports, 1 Exchequer, 109.*]

THESE were actions for non-acceptance of shares, and for calls, and cross-actions for recovery of deposit, and for damages for not duly allotting shares, turned into a special case.

The company was completely registered 6th June, 1864. By the second article of association it was provided that the company should continue incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing.

The prospectus of the company contained the following words: "Deposit on application 1*l.* per share, and 4*l.* on allotment." And it was further stated that if no allotment were made the deposit would be returned.

The defendant Montefiore, on the 8th of June, 1864, filled up, signed and sent to the directors the printed form of application annexed to the prospectus, which was as follows:—

GENTLEMEN,—Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me fifty shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares, or any smaller number that may be allotted to me, to pay the

(*a*) Park, J., was absent at Chambers.

deposit and calls thereon, and to sign the articles of association of the company at such times and in such manner as you may appoint.

The defendant had so paid the sum of 50*l.*, and had taken from the bankers the following receipt:—

Received, the 8th of June, 1864, on account of the directors of the Ramsgate Victoria Hotel Company (Limited), the sum of 50*l.*, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of fifty shares in the same undertaking.

On the 17th of August the secretary made out and submitted to the directors a list of applicants for shares up to that time, in which appeared the name of the defendant for fifty shares. The list was headed: "List of subscribers, August 17, 1864."

On the 2d of November the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On the 8th of November, the defendant, having received no communication from the company, withdrew his application.

On the 23d of November the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call, and by their direction the secretary wrote the following letter to the defendant:—

SIR,—I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you fifty shares in this company, and have entered your name in the register of shareholders for the same; and I have to request that you will pay the balance of the first call, as noted below, on or before the 15th December, to the London and County Bank, 21 Lombard Street, E. C.

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies' Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

*Mellish*, Q. C. (*Digby* with him), for the company, contended that, although in ordinary cases the assent of both parties, mutually communicated, was necessary to form a contract, yet on the authority of *Ex parte* Bloxam (*a*) and *Ex parte* Cookney (*b*) shares might be completely allotted without any communication to the applicant, or acceptance by him; that the facts above stated showed an allotment made

(a) 33 L. J. (Ch.) 519, 574.

(b) 3 De G. & J. 170; 28 L. J. (Ch.) 12.



on the 17th of August; but that, if not, the allotment in November was, considering the nature of the contract, made within a reasonable time, and, if so made, the letter of withdrawal was inoperative.

*M. Chambers*, Q. C. (*Cohen* with him), for the defendants, were not called on.

THE COURT (POLLOCK, C. B., MARTIN, CHANNELL, PIGOTT, B.B.), observed that, in both cases cited, the question was as to the liability of an applicant for shares as a contributory, and they referred to the judgment of Turner, L. J., in *Ex parte Bloxam* (a), as explaining the *ratio decidendi* in that case; they held that there was no allotment till November 23, that the allotment must be made within reasonable time, and that the interval from June to November was not reasonable, and therefore gave

*Judgment for both the defendants.*

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## DICKINSON v. DODDS.

IN THE HIGH COURT OF JUSTICE, JANUARY 25, 26, 1876.

IN THE COURT OF APPEAL, MARCH 31, APRIL 1, 1876.

[Reported in 2 Chancery Division, 463.]

ON Wednesday, the 10th of June, 1874, the Defendant John Dodds signed and delivered to the Plaintiff, George Dickinson, a memorandum, of which the material part was as follows:—

“I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

“£800. (Signed) John Dodds.

“P.S.—This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874.

“(Signed) J. Dodds.

The bill alleged that Dodds understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allen, the other Defendant. Thereupon the Plaintiff, at about

(a) 23 L. J. (Ch.) 575, 576.

half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the Defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the Defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on the 25th of January, 1876.

*Kay, Q. C., and Caldecott, for the Plaintiff:—*

The memorandum of the 10th of June, 1874, being in writing, satisfies the Statute of Frauds. Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be charged, a proposal, if accepted by the other party, is within the statute: *Reuss v. Picksley* (a), following *Warner v. Willington* (b).

In *Kennedy v. Lee* (c) Lord Eldon states the law to be, that "if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." So that not only is a parol acceptance sufficient, but such an acceptance relates back to the date of the offer. This is further shown by *Adams v. Lind-*

(a) Law Rep. 1 Ex. 342.

(b) 3 Drew. 523.

(c) 3 Mer. 441, 454.

*sell* (a), where an offer of sale was made by letter to the Plaintiffs "on receiving their answer in course of post." The letter was misdirected, and did not reach the Plaintiffs, until two days after it ought to have reached them. The Plaintiffs immediately on receiving the letter, wrote an answer accepting; and it was held that they were entitled to the benefit of the contract.

The ruling in *Adams v. Lindsell* (a) was approved by the House of Lords in *Dunlop v. Higgins* (b), as appears from the judgment of Sir G. Mellish. L. J., in *Harris' Case* (c); and it is now settled that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving by the Plaintiff of the notice at Dodds' residence was equivalent to the delivery of a letter by a post-man.

That Allan is a necessary party appears from *Potter v. Sanders* (d); and if Allan has had a conveyance of the legal estate, the Court will decree specific performance against him.

*Swanston, Q. C., and Crossley, for the Defendant Dodds:—*

The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract; *Cooke v. Oxley* (e); Benjamin on Sales (f).

After Dodds had retracted by selling to Allan, the offer was no longer open. Having an option to retract, he exercised that option: *Humphries v. Carvalho* (g); Pollock on Contracts (h); *Routledge v. Grant* (i).

In delivering judgment in *Martin v. Mitchell* (j), Sir T. Plumer, M. R., put the case of a contract signed by one party only. He asked (k) "What mutuality is there, if the one is at liberty to renounce the contract, and the other not?" and in *Meynell v. Surtees* (l), the distinctions between an offer and an agreement in respect of binding land were pointed out: Fry on Specific Performance (m).

The postscript being merely voluntary, without consideration, is *nudum pactum*; and the memorandum may be read as if it contained no postscript.

*Jackson, Q. C., and Gazdar, for the Defendant Allan:—*

Allan is an unnecessary party. If Dodds has not made a valid contract with the Plaintiff, he is a trustee for Allan; if Dodds has made a binding contract, rights arise between Allan and Dodds which are not now in controversy.

We agree with the co-Defendant that, in order that the Plaintiff

(a) 1 B. & A. 681. (b) 1 H. L. C. 381. (c) Law Rep. 7 Ch. 587, 595. (d) 6 Hare, 1.  
 (e) 3 T. R. 653. (f) 2nd Ed. p. 52. (g) 16 East, 45. (h) Page 8.  
 (i) 4 Bing. 653. (j) 2 Jac. & W. 413. (k) Page 428. (l) 1 Jur. (N.S.) 737. (m) Page 80.

may have a *locus standi*, there must have been a contract. If the postscript is a modification of the offer, it is *nudum pactum*, and may be rejected.

It may be conceded that if there had been an acceptance, it would have related back in point of date to the offer. But there was no acceptance. Notice of acceptance served on Mrs. Burgess was not enough.

Even if it would have been otherwise sufficient, here it was too late. Dodds had no property left to contract for. The property had ceased to be his. He had retracted his offer; and the property had become vested in some one else: *Hebb's Case* (a).

The Plaintiff would not have delivered the notice if he had not heard of the negotiation between Dodds and Allan. What retraction could be more effectual than a sale of the property to some one else?

The Defendant Allan was a *bond fide* purchaser without notice.

Kay in reply:—

The true meaning of the document was a sale. The expression is not "open," but "over." The only liberty to be allowed by that was a liberty for the Plaintiff to retract.

But, taking it as an offer, the meaning was, that at any day or hour within the interval named, the Plaintiff had a right to indicate to the Defendant his acceptance, and from that moment the Defendant would have had no right of retraction. Then, was there a retraction before acceptance? To be a retraction, there must be a notification to the other party. A pure resolve within the recesses of the vendor's own mind is not sufficient. There was no communication to the Plaintiff. He accepted on two several occasions. There could have been no parting with the property without communication with him. He was told that the offer was to be left over.

The grounds of the decision in *Cooke v. Oxley* (b) have been abundantly explained by Mr. Benjamin in his work on Sales. It was decided simply on a point of pleading.

BACON, V. C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of the 10th of June, 1874, and the statement of the Defendant's case as given in his answer, continued:—

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the Plaintiff to enter into the contract was the Defendant's compliance with the Plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript,

(a) Law Rep. 4 Eq. 9, 12.

(b) 3 T. R. 653.

it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the Plaintiff shall not be called upon to accept, or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the Plaintiff at the place of abode of the Defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the Plaintiff did accept and testify his acceptance. From that moment the Plaintiff was bound, and the defendant could at any time, notwithstanding Allan, have filed a bill against the Plaintiff for the specific performance of the contract which he had entered into, and which the Defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the Defendant had entered into a contract with Allan, because, giving to the Defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the Plaintiff—the law, I take it, is clear on the authorities, that if a contract, unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the Defendant to say, “I made up my mind that I would withdraw, but I did not tell the Plaintiff; I did not say anything to the Plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement.” In my opinion, after that hour on Friday, earlier than nine o'clock, when the Plaintiff and Defendant met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the Defendant's contention that he is not bound to perform this agreement, and the case of *Cooke v. Oxley (a)* was referred to. But I find that the judgment in *Cooke v. Oxley (a)* went solely upon the pleadings. It was a rule to show cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the Defendant. There was no suggestion of any agreement which could be enforced. The Defendant proposed to

the Plaintiff to sell and deliver, if the Plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the Plaintiff says he agreed to purchase, but does not say the Defendant agreed to sell. He agreed to purchase, and gave notice before four o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice Buller says, "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at four o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the Plaintiff.

*Routledge v. Grant* (a) is plainly distinguishable from this case upon the grounds which have been mentioned. There the contract was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the Court was that he was perfectly right.

Then *Warner v. Willington* (b) seems to point out the law in the clearest and most distinct manner possible. An offer was made—call it an agreement or offer, it is quite indifferent. It was so far an offer, that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the Defendant Dodds that he will sell for £800, and, not a promise, but, an agreement, part of the same instrument, that the Plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at nine o'clock. Before Friday at nine o'clock the Defendant receives notice of acceptance. Upon what ground can the Defendant now be let off his contract? It is said that Allan can sustain his agreement with the Defendant, because at the time when they entered into the contract the Defendant was possessed of the property, and the Plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a Defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what Allan says in sub-

(a) 4 Bing. 653.

(b) 3 Drew. 523.

stance, for he says that the sale to him was a retraction which deprived Dodds of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the Plaintiff, and Dodds had nothing to sell to Allan. The property remained intact, unaffected by any contract with Allan, and there is no ground, in my opinion, for the contention that the contract with Allan can be supported. It would be doing violence to principles perfectly well known and often acted upon in this Court. I think the Plaintiff has made out very satisfactorily his title to a decree for specific performance both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both Dodds, the vendor, and Allan, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in the property; and the Plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

From this decision both the Defendants appealed, and the appeals were heard on the 31st of March and the first of April, 1876.

*Swanston*, Q. C. (*Crossley* with him) for the Defendant Dodds.

Sir *H. Jackson*, Q. C. (*Gazdar* with him), for the Defendant Allan.

*Kay*, Q. C., and *Caldecott*, for the Plaintiff.

The arguments amounted to a repetition of those before the Vice-Chancellor. In addition to the authorities then cited the following cases were referred to: *Thornbury v. Beville* (a); *Taylor v. Wakefield* (b); *Head v. Diggon* (c); *Palmer v. Scott* (d).

JAMES, L.J., after referring to the document of the 10th of June, 1874, continued:—

The document, though beginning “I hereby agree to sell,” was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum—“This offer to be left over until Friday, 9 o’clock A. M., 12th June, 1874.” That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o’clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that

(a) Y. and C. Ch. 554. (b) 6 E. & B. 765. (c) 3 Man. & Ry. 97. (d) 1 Russ. & My. 391.

promise, and could not in any way withdraw from it or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L. J. :—

I am of the same opinion. The first question is, whether this docu-



ment of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A. M." Well, then, this being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allen from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this—If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which

to accept an offer is not bound by his promise to give that time ; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J. A :—

I entirely concur in the judgments which have been pronounced.

JAMES, L. J. :—The bill will be dismissed with costs.

## ADAMS AND OTHERS v. LINDSELL AND ANOTHER.

IN THE KING'S BENCH, JUNE 5, 1818.

[Reported in 1 Barnewall &amp; Alderson, 681.]

ACTION for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday, the 2nd of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire:

"We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two month's bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p. m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

*Jervis*, having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

*Dauncey*, *Puller*, and *Richardson* showed cause. They contended that at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Friday evening when there had been no change of circumstances. They were then stopped by the Court, who called upon

*Jervis* and *Campbell* in support of support of the rule. They relied on *Payne v. Cave*, (a) and more particularly on *Cooke v. Oxley* (b). In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the con-

(a) 3 T. R. 148.

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(b) 3 T. R. 653.

tract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

THE COURT said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

*Rule discharged.*

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BYRNE & Co. v. LEON VAN TIENHOVEN & Co.

IN THE HIGH COURT OF JUSTICE, MARCH 6, 1880.

[Reported in 5 Common Pleas Division, 344.]

ACTION tried at Cardiff assizes, before Lindley, J., without a jury.

*B. T. Williams* and *B. Francis Williams*, for the plaintiffs.

*M'Intyre*, Q. C., and *Hughes*, for the defendants.

*Cur. adv. vult.*

MARCH 6. LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury: and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be 375*l*.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively.

These letters and telegram were as follows :—[ The learned judge read the letter of the 1st of October, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1000 boxes of this brand 14 x 20 at 15s. 6d. per box f.o. b. here with 1 per cent. for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The answer was a telegram from the plaintiffs to the defendants sent on the 11th of October, 1879: "Accept thousand Hensols." On the 15th of October, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P. M., and immediately cabled acceptance of the 1000 boxes 'Hensol,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster & Brothers, London, for 1000l. . . . Will thank you to ship the 1000 'Hensols' without delay."] These letters and telegrams would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raised two other defences to the action which remain to be considered. First, they say that the offer made by their letter of the 1st of October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On the 8th of October the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent. we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and in fact a contract for 1000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled 'offer withdrawn,' you would

have protected yourselves and us too. We disposed of the 1000 boxes on the 17th at a net profit of 1,850 dollars. . . We write our friend Philip S. Philips, Esq., of Aberkillery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1000 boxes Hensol at 17s.6d. The only firm offer we received from you under date 1st of October was 1000 boxes at 15s.6d., and ten per cent. f. o. b. Cardiff; we cable you to-night 'demand shipment.'" This letter is followed by one from the defendants to the plaintiffs of the 25th of October refusing to complete. [The learned judge read it. The defendants acknowledged the receipt of the cable message of the 20th, inclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst. we now return the above credit for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such."]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge v. Grant* (a). For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Tayloe v. Merchants Fire Insurance Co.* (b), cited in Benjamin on Sales pp. 56—58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance

(a) 4 Bing. 653.

(b) 9 How. Sup. Ct. Rep. 390.

with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: *Harris' Case* (a) *Dunlop v. Higgins* (b), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool as stipulated in the contract, they cannot maintain any action for its breach. The correspon-

(a) Law Rep. 7 Ch. 587.

(b) 1 H. L. 331.

dence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment; and although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance according to the contract.

By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against,—i. e., were to be exchanged for—shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st of October say that, "even if we had not withdrawn our offer we would all the same have returned your credit," and the defendants' solicitors in their letter of the 26th of November, say that, "if your clients (i. e. the plaintiffs), had fulfilled the terms of the contract at the outset the goods were ready to be shipped;" but the defendants' own letters of the 8th, 13th and 25th of October show conclusively that this was not the case and that the defendants stood on their notice of withdrawal and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October in which they return the plaintiffs' first letter of credit is explicit on this point. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that if the offer had not been withdrawn the defendants would not have returned the letter of credit although in future transactions they might have been more particular. In face of this refusal, it was useless for the plaintiffs to send a banker's acceptance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent banker's acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it, and a passage in Mr. Benjamin's book on Sales, p. 454, was referred to in support of this contention. But, when the plaintiffs found that the



defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., *Avery v. Bowden* (a) and others of that class), show that as the plaintiffs did not when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to show that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary *Ripley v. McClure* (b), and *Cort v. Ambergate, etc., Ry. Co.* (c) show that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs. For the reasons above stated I give judgment for the plaintiffs for 375*l.* and costs.

*Judgment for plaintiffs.*

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## DUNLOP v. HIGGINS.

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 24, 1848.

DUNLOP AND OTHERS, *Appellants*.

VINCENT HIGGINS AND OTHERS, *Respondents*.

[Reported in 1 House of Lords Cases, 381.]

THIS was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You

(a) 5 E. & B. 714.

(b) 4 Ex. 345.

(c) 17 Q. B. 127.

say 65s. net, for 2000 tons pigs. Does this mean for our usual four-months' bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65s. net, and not a four-months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock P.M. on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of *yesterday*, but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of the 28th not having been accepted in course." Messrs Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P.M. on that day. A letter so dispatched would be due in Glasgow at two o'clock P.M. on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock A.M., and letters to be despatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock P.M. of Saturday, the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking

of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory, as Lord Ordinary, who directed an issue, which he settled in the following terms :—

“ Whether, about the end of January, 1845, Messrs. Higgins purchased from Messrs. Dunlop 2,000 tons of pig-iron, at the price of 65s. per ton, and whether Messrs. Dunlop wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at 6,000*l*.” This issue was tried before the Lord Justice General, when it appeared that the letter of Messrs. Higgins, accepting the offer, was written on the 30th; that it was posted a short time after the closing of the bags for the despatch at three o'clock P. M. on that day, and consequently did not leave Liverpool till the despatch at one o'clock in the morning of the 31st; that, in consequence of the slippery state of the roads, the bag then sent did not arrive at Warrington till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury “ that he adopted the law as duly expounded in the case of *Adams v. Lindsell*, (a) and which is as follows : ‘ A., by a letter, offers to sell to B. certain specified goods, *receiving an answer by return of post*; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived, if the original letter had been properly directed, A. sold the goods to a third person,’ and in which it was held ‘ that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.’ ”

The counsel for Messrs. Dunlop tendered the following exceptions : The first exception related to evidence, and alleged “ that no evidence to show that the letter, purporting to be dated on the 31st, was really written on the 30th of January, ought to have been admitted.” The other exceptions related to the charge, and were as follows :—

2. In so far as his Lordship directed the jury, in point of law, that if Messrs. Higgins posted their acceptance of the offer in due time according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

3. In so far as his Lordship did not direct the jury, in point of law, that, if a merchant makes an offer to a party at a distance by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have been actually written and posted

in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

4. In so far as his Lordship did not direct the jury, in point of law, that, in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

5. In so far as his Lordship did not direct the jury, in point of law, that, in case of failure to deliver goods sold at a stipulated price and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.

These exceptions were afterwards argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

Mr. *Bethell* and Mr. *Anderson*, for the appellants.

The question raised in this case is one of considerable importance, and the decision of it in accordance with the judgment of the court below, will have the effect of rendering the acceptance of contracts a matter of doubt and uncertainty. If the decision of the judges of the Court of Session is right, a contract is complete when the acceptance of the offer to enter into it is posted, although such acceptance may not reach the person who made the offer till long after the time at which, by the usage of trade, he is entitled to expect it. Such a decision, if unreversed, will leave the person making an offer under the necessity of waiting for an indefinite time in order to know whether his offer has been accepted. During all this time he will be restrained from freely dealing with his own property.

The exceptions here ought to have been sustained by the Court. The first of them relates to the evidence offered at the trial. That evidence was improperly admitted. The Court ought not to have received evidence to contradict a written document. When a letter is sent to a party, he has a right to assume that it is properly written, and is entitled to rely on its contents. He is at least entitled to do so as against the writer of the letter. The writer is not at liberty to show those contents to be erroneous: at all events he is not at liberty to do so after the person receiving it has acted upon it, and thus to affect the rights of that party, and to give himself rights to which, if the letter had been correctly written, he would not have been entitled. To admit such evidence is to unsettle all the rules of business, and to

prevent commercial men acting with that certainty and confidence which are necessary for the proper conduct of commercial affairs.

[THE LORD CHANCELLOR. When a party sends a letter, actually sent on the 30th, but dated by mistake on the 31st, may he not show that that date had been put in by mistake?]

It might be difficult to maintain the simple negative of that question, but in considering the admissibility of such evidence, all the circumstances of the case must be referred to. In the present case, for instance, as the letter was received on a day after that of its date, and when therefore the person receiving it had no reason to suspect that the date was erroneously given, his rights ought not to be affected by a subsequent explanation; and the evidence intended to afford that explanation ought not therefore to have been admitted.

Then as to the second exception: if a letter sent is posted in due time, but is not received in due time, who is to bear the loss consequent upon its non-delivery? Certainly not the person to whom it is sent. The fact that it is sent by the post-office makes no difference in the matter. It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the post-office, and surely they cannot be made so in a case in which the persons sending an answer to an offer which they had made, totally disregarded the ordinary usages of commercial houses as to the time of sending such answer.

The clear principle, set forth in the third objection, is that which ought to be adopted in all cases of this kind. Where an individual makes an offer by post, stipulating for, or, by the nature of the business, having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness such as may not be required where he is only endeavoring to excuse himself from a liability. The question of reasonableness of notice, which may be admitted in cases of bills of exchange, cannot be introduced in a case where one party seeks to enforce on another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created.

Then as to the [fourth?] exception. In the case of a contract, the acceptance of the offer creates the contract; the acceptance implies that both parties have knowledge of all the circumstances. On prin-

ciple, it is plain that the acceptance should be immediate, and that if there is a delay in making that acceptance known, the offerer is free. In order to make the contract perfect, there ought to have been a co-existing assent. *Countess of Dunmore v. Alexander* (a). There, a lady having written to another to engage a servant for her, and then sent a second letter to countermand the first, and the two letters having been delivered to the servant simultaneously, it was held that there was not a complete contract, and that the servant was not entitled to wages. The Court of King's Bench, in *Head v. Diggon*, (b) acted upon the same principle. There, A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. The Court held that this was not an absolute bargain, and that within the three days B. had a right to retract.

Such are the principles which ought to govern this case. Then as to authority. It is curious enough that this exact question seems never to have arisen. That circumstance is some proof of the clearness of the principle which is applicable to such transactions, for had there been any question as to that principle,—had it been doubtful whether delay might be excused, and whether, in spite of delay, a party guilty of it might not still insist on a contract being complete, cases must have arisen as to the degree of laxity permitted by the law in the acceptance of contracts. None such is to be found. The case of *Adams v. Lindsell* (c) was the authority adopted by the Lord Justice General in his direction to the jury: but that case does not justify his ruling. [THE LORD CHANCELLOR. If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?] If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk. But supposing delay is to be permitted, to what extent is it to be allowed? May the delay last one, two, or three days, or a week, or a fortnight, or a month? If any delay is to be permitted, the extent of it must be defined. Otherwise, all commercial matters will be in a state of perpetual uncertainty. But, in fact no delay is allowed. Each party is bound to write by return of post, and each is liable to the consequences of his own letter [not?] arriving in time. Such appears to be the mercantile usage on the subject. When an offer is made by one merchant to send to another a particular commodity which varies in price, that offer is made subject to the obligation of its being answered by return of post. It is therefore an offer subject to a condition. It is conditional in point both of time and manner of acceptance. As to time, the offer enures till it can be answered by return of post. If it is made on a condition, then it is clearly not binding till that condition shall be accepted. Here, too, the condition is a condition precedent. Nothing, therefore, can be substituted for it.

(a) 9 Shaw & Dunlop, 190. (b) 3 Manning & Ryland, 97. (c) 1 Barnewell & Alderson, 681.

[THE LORD CHANCELLOR. Where is this condition imposed?]

In mercantile usage, founded on law. The legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post. No decision has ruled, as a point of legal principle, that, if an individual addressed fails in performing this condition, still that the person making the offer is bound. The principle of the Scotch law, as stated in M'Douall's Institutes, is the other way. It is there said (a), "Conditional obligations, properly so termed, are presently binding and irrevocable, and only the effect is suspended, but sometimes the obligation is only to be contracted upon a condition which affects the very substance of it. Thus an offer has an implied condition of acceptance, whereby alone the consent of the other party accedes and converts the offer into a contract; so that it is not binding, but ambulatory or revocable, till it is accepted, and therefore either revocation by the offerer or death of either party before acceptance, voids it. The same rule holds in mutual contracts,—the one party subscribing is not bound till the other subscribe likewise." The law of England is in conformity with the principle of the Scotch law.

As the revocation by either party before acceptance makes the offer void, the acceptance of the other side must be notified within a definite period of time; Stair's Institutes (b). This rule of notification is a condition precedent in the English as well as the Scotch law. This principle was acted on by the Court of King's Bench in the case of *Davison v. Mure* (c). That was the case of a ship which was captured by the Americans while under convoy. The condition there was that the master should make the best defense, and without it appeared to a court-martial that he had done so, he was not to be allowed to recover. It was held that this condition was a condition precedent. The same doctrine was applied by that Court to the condition in a policy of insurance against fire, that the party should obtain a certificate from the rector of his parish, and a certain number of the inhabitants, before entitling himself to payment of his claim for loss; *Worsley v. Wood* (d). If this is a condition precedent, then it must be exactly performed, and nothing can be substituted for it. In this respect there is a difference between a condition precedent and a condition subsequent. The former must be performed before an estate can vest; while the performance of the latter, which is intended to defeat an existing estate, may be dispensed with. The act of God, the king's enemies, or the impossibility of performance, will furnish an excuse as to a condition subsequent. This is a settled principle of our law, and the case of *Brodie v. Todd* (e) shows that the law of Scotland recognizes the same rule. In that case,

(a) Bk. 1. tit. 4, p. 98, fol. ed.  
(d) 6 Term Rep. 710.

(b) Tit. 2, § 8.

(c) 3 Douglas, 28.

(e) 17 Fac. Col. Dec. 20, May, 1814.

Arnot, a merchant of Leith, agreed to purchase from Todd & Co. of Hull, goods which were to be paid for by his acceptance. They put the goods on board a vessel at Hull; enclosed a bill of lading and a draft for the price in a letter, advising Arnot of the shipment, and requesting him to return the draft accepted "in course." This letter was received by Arnot on the morning of the 24th of April, and if answered by him by return of post the answer might have been received by Todd & Co. on the morning of the 26th. Arnot, however, did not answer it till that day, when he sent back the draft accepted. In the course of the 26th, Todd & Co., not having received the draft as expected, re-landed the goods. Arnot brought an action; and the question was, whether the request to return "in course," meant a return by the earliest post, and constituted a condition precedent. The Lords held that the words meant by return of post, and did constitute a condition precedent, and consequently that no action was maintainable by Arnot, since he had not complied with the condition on which the bargain was made. That case is completely decisive as to what is the doctrine of the Scotch law, and must govern the decision here.

[THE LORD CHANCELLOR. Is it not a question of fact, whether the posting of the letter, in this case, on the 30th of January, was not a compliance with the duty of the party? Here is no distinct stipulation,—it is all matter of inference. The question is whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive. In the case quoted, one whole day was allowed to intervene. But in this case, if putting the letter in the post is a compliance with the condition, there is an end of the question.]

That would be so, if it was a condition subsequent, for then something could be substituted for actual performance. But this is a condition precedent, and must be literally performed.

In considering this question Lord Jeffrey observed, "The party here only says, 'If I do not hear by return of post.' I have yet to learn that the return of post is like the return of the sun to the meridian at a particular time. I do not think that the use of such a phrase is equivalent to the stipulation of a particular time. I am inclined to hold that the return of post means the actual return of the post. And the *species facti* here was, the letter accepting the offer having been sent in due time to the post-office, that it did [not?] come to hand at the hour at which, according to the usual time required for its transmission, it should have come. But the actual course of *that* post was not till the morning of the 1st of February." And the learned Judge justifies his doctrine by referring to the case of the post coming by sea, where a general average time is fixed, but where return of post



is not calculated by that average, but by the actual arrival of the post, and then he supposes a universal snow-storm affecting the delivery by land, and argues that if matter of that general notoriety would affect the question, so does any other accident to the post although not so generally known. But surely this is giving an entirely new interpretation to mercantile contracts, and is making accidental circumstances or natural delays, always counted upon, furnish ground for the construction of a delay occasioned by an accident which neither party anticipated. Besides, it is clear on the facts here, that had the letter been put into the early post of the 30th January, this accident would not have befallen it; so that the accidental delay in the post-office was really the consequence of the delay in posting the letter, and was so far attributable to the respondents.

They cannot, therefore, claim any advantage from their acceptance of the contract, which acceptance they did not notify, nor condemn the other parties for non-performance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment. This is the rule declared in Bell's Principles of the Law of Scotland (a), and this rule must be applied to, and must govern the decision of the present case.

Mr. *Stuart Wortley* and Mr. *Hugh Hill*, for the respondents, were not called on.

THE LORD CHANCELLOR. My Lords, every thing which learning or ingenuity can suggest on the part of the appellants, has undoubtedly been suggested on the part of the learned counsel who have just addressed the House; and if your Lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had every thing suggested to you that by possibility could be advanced in favor of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of January. A proposition had been made by the Glasgow house of Dunlop, Wilson, & Co., to sell 2000 tons of pig-iron. The answer

is of that date of the 31st of January: "Gentlemen, we will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and the 1st of February, the parties making the offer had changed their minds; and instead of being willing to sell 2000 tons of pig-iron on the terms proposed, they were anxious to be relieved from that stipulation; and on that day, the 1st of February, they say, "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig-iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him; for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your Lordship's attention to the proposition presented for your decision by that first exception.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders being admitted to be dated on the 31st of January, and received in Glasgow by the mail which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of January was written and despatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3d of February) of any such accident having occurred."

The counsel for the pursuer answered that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of the 28th of January, and that, according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The Lord Justice General did overrule the objection, and admitted the evidence.

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

I pass on then to the fourth exception which is connected with this point, and which states that his Lordship did not direct the jury in point of law, that, in the case above supposed, if an answer arrives bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident; that is to say, that if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

My Lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your Lordships to concur in the opinion that I have formed—that the learned Judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment.

Now, there may be some little ambiguity in the construction of that

proposition. It proceeds on the assumption that by the usage of trade an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the Post Office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed, it is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because, for accidents happening at the Post Office he is not responsible.

My Lords, the case of *Stocken v. Collin* (a) is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says, "It was a question for the jury whether the letter was

(a) 7 Meeson & Welsby, 515.

put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice, was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell* (a). That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*."

The defendants must be considered in law as making during every instant of the time their letter was travelling the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and

(a) 1 Barnewall & Alderson, 681.

these cases seem to be the leading cases on the subject, and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

Now whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it appears to me that the learned Judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

The next exception is the third, which says, "In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer."

That, my Lords, raises first of all a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

I believe that in these remarks I have exhausted the whole of the objections made; and my advice to your Lordships is to affirm the judgment of the court from which this is appealed.

*It was ordered that the interlocutor complained of should be affirmed, with costs.*

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COUNTESS OF DUNMORE AND HUSBAND, *Advocators.*  
ELIZABETH ALEXANDER, *Respondent.*

COURT OF SESSION IN SCOTLAND, DECEMBER 15, 1830.

[Reported in 9 *Shaw and Dunlop*, 190.]

THE Countess of Dunmore, being about to change a servant, and having heard that Elizabeth Alexander was to leave the service of

Lady Agnew of Lochnaw, wrote to her ladyship, mentioning the circumstance ; stating that the wages she gave were £12. 12s. per annum, and requesting to be informed as to Alexander's character. Lady Agnew, in answer, stated that she could recommend Alexander, who would gratefully accept the proposed wages ; and her ladyship added as follows ; " If Lady Dunmore decides upon taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term." On the fifth of November, the Countess wrote to Lady Agnew, requesting that she would " have the goodness to engage Betty Alexander for her at the £12. 12s. a year, but she wishes to have her at the new term, or as soon after as possible, because her present one must go at that time." The letter went through the post-office to Lochnaw ; but as Lady Agnew had gone to Glasserton-house, it was sent to her there. Upon receiving it Lady Agnew desired her housekeeper, Mrs. Moore (who had accompanied her), to notify the Countess's answer to Alexander, which was done by Moore making an addition on the letter itself and putting it into the post-office, addressed to Betty Alexander at Lochnaw. In the meanwhile, on the 6th of November (the day after writing the above letter), the Countess addressed another letter to Lady Agnew intimating that she no longer needed Alexander. This second letter, which was also addressed to Lochnaw, was sent to Lady Agnew at Glasserton-house, and was received immediately after the other had been despatched to the post-office ; but Lady Agnew sent the second one by express to the post-office, and both the letters arrived at Lochnaw together, and were delivered at the same moment to Alexander. Lady Dunmore having declined to receive her, or pay her wages, Alexander raised an action against her in June, 1827, before the Sheriff of Stirlingshire, for wages and board-wages for six months, from Martinmas, 1826, to Whit-sunday, 1827, at which time she had got a new situation.

In support of this demand, she maintained that there had been a completed contract, and that Lady Dunmore was not entitled to resile. On the other hand, her Ladyship contended, that as the two letters had been received by Alexander at one and the same time, she was made aware that her services would not be required, and therefore she could not allege a concluded contract.

The Sheriff Substitute, after finding the above facts, pronounced an interlocutor in these terms : Finds that Lady Agnew's card, formerly referred to, cannot from its terms be interpreted or considered otherwise than as an offer, on the part of the pursuer, to engage as a servant with the noble defender on the terms proposed in a communication, to which this card is obviously an answer ;—finds it doubtful whether the noble defender's reply to Lady Agnew, contained in the card libelled on, uncommunicated in any way to the pursuer, can be held

to be a legal acceptance of the offer ;—but finds it very clear, abstractedly from the specialties of the present case, that the said card, communicated, in the manner it has been done, to the pursuer by Lady Agnew through Mrs. Moore, must be held to be a legal acceptance of the offer, an actual engagement of the pursuer, and a completion of the contract, from which neither party was entitled to resile ;—therefore finds that the issue of this case depends on the solution of the question, whether a party who accepts of an offer is entitled at the same moment, *unico contextu*, or with the same breath, to retract his acceptance. And the Sheriff Substitute being of opinion that the instant an offer is accepted of the contract is completed, it is not in the power of either party to retract or resile ;—that from the moment of acceptance, as expressed by Mr. Bell in treating of the contract of sale, there is between the parties *in idem placitum concursus et conventio*, which constitutes the contract ;—finds that, as in the present instance the contract was completed by the transmission of the card libelled on to the pursuer, the engagement between the parties was rendered indissoluble without the consent of both, and that it was consequently beyond the power of the noble defender at any time, however short the interval, to retract the acceptance, or resile from the engagement ;—on these grounds repels the defense, and decerns against the noble defenders in terms of the conclusion of the libel.

The Sheriff Depute having adhered, the Countess advocated ; and the Lord Ordinary, having ordered cases, “advocated the cause, approved of the findings in point of fact in the Sheriff’s interlocutor ; but altered the judgment of the Sheriff, sustained the defenses, assoilzied the advocates,” and found no expenses due. (a)

*Alexander reclaimed.*

(a) The Sheriff, in his interlocutor of 15th February, 1828, has stated the facts correctly, but his judgment seems inconsistent with the facts he has found. He puts his opinion on the ground that the contract was only completed by the communication to the pursuer of Mrs. Moore’s letters ; yet he conceives there was some interval betwixt her knowledge of the consent and of the recall which rendered the latter ineffectual. But as the letters were delivered to the pursuer by the same person and at the same moment, while it is impossible to know which was first read, they must be held as one communication, and the notification of recall being simultaneous with that of the consent must do it away altogether.

The pursuer in this court has not attempted to support the Sheriff’s view. But assuming that the Lady Agnew’s letter of the 2d of November contained an offer on the part of the pursuer, and that Lady Dunmore’s letter of the 5th was an acceptance of that offer, she contends that the contract was completed, so as to bar resiling, either by the writing or putting that letter into the post-office, or at least by its being received by Lady Agnew.

The Lord Ordinary thinks it doubtful if the letter of the 2d can be held as an offer made on the pursuer’s part, or any thing but an answer to Lady Dunmore’s inquiries. But at any rate it seems clear, from the terms of her letter of the 5th, that Lady Dunmore did not understand it as such, and that she did not mean her letter as an acceptance communicated to Lady Agnew, as acting for the pursuer. The letter plainly gives a commission to Lady Agnew to act as the writer’s mandatory in engaging the pursuer, conceiving that the contract was still to be made. Now, having given such a commission, it was in the power of Lady Dunmore to give contrary instructions to her mandatory ; and if these were received in such time that the man-



LORD BALGRAY. The admission that the two letters were simultaneously received puts an end to the case. Had the one arrived in the morning, and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a subsequent letter, that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the post-office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the post-office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.

LORD CRAIGIE. I take a different view. Lady Agnew, acting for the servant, writes to Lady Dunmore, stating Alexander's readiness to accept the proposed wages, recommending her on account of her character, and concluding thus: "If Lady Dunmore decides on taking

datory was able to recall any step that she had taken before the contract was completed no obligation could be incurred.

Even if the letter of the 5th could be viewed as an acceptance, it seems impossible to hold that it was sent to Lady Agnew as mandatory of the pursuer, so that the receipt of it by her completed the bargain. The writer plainly constitutes Lady Agnew as her mandatory in what was to be done, although it may be possible to hold that, by "engaging the pursuer," she meant that she should communicate to her the acceptance contained in her letter; and this communication was therefore necessary to perfect the location.

But the pursuer, on the authority of a passage in Mr. Bell's work, maintains that it is not necessary, in order to complete a consensual contract, that the acceptance should be communicated to the offerer, because the offerer having previously consented, the mere consent of the person to whom the offer is made constitutes the *consensus in idem placitum*, which is all that is requisite to perfect his engagement. But if the learned author's meaning is to be taken in the extensive sense here contended for, so as to bar the acceptor from resiling, it does not seem to be supported by sufficient authority. From the reason assigned, the mere existence of a consent in the acceptor's mind would have the effect to bind him,—a thing which might admit of being proved by a reference to oath. The pursuer indeed disclaims going this length, and contents herself with maintaining that any clear expression of the consent will be sufficient.

But surely the expression of consent made to a third person altogether unconnected with the offerer will not do, nor will the writing of a letter of acceptance be sufficient, if this letter is never sent. The Lord Ordinary conceives that if, after writing such a letter, the author should add a postscript, stating, that on further consideration, or in consequence of new intelligence, he did not choose to accept the offer, and if, from the letter's referring to other matters, he still thought it necessary to send it, the acceptance would be effectually recalled. But if this be the case, the same effect must follow when a second letter retracting the offer is transmitted by the same post, so as to be received at the same time, or where a communication to this effect is made by express or otherwise to the offerer before the acceptance reaches him. In short, each party may refile, so long as his offer or acceptance has not been communicated to the other party.

The pursuer may have suffered from the disappointment of her expectations; but the same hardship would have been felt, had Lady Dunmore written no letter but the last, in which case, however, the pursuer could have had no claim. The different ranks of the parties, and the great importance of the sum claimed to the one in comparison with the other, leads naturally to the giving all possible weight to the pursuer's argument. But any plea of favor of this kind is in great measure done away by the very discreditable account which she has given as to her receipt of the letters, particularly in her deposition when examined as a haver in the Inferior Court.

Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or old term." Now, what is the answer of the Countess? A request to Lady Agnew to engage the servant at the wages mentioned, accompanied with a notice that "she wishes to have her at the new term," &c. Lady Agnew was thus the mandatory for both parties, the mistress and the servant; she was on the same footing as a person in the well-known situation of broker for both buyer and seller. Every letter between the principals, relative to an offer or an acceptance respectively, was, as soon as it reached Lady Agnew, the same as delivered for behoof of the party on whose account it was written. I hold, therefore, that when Lady Dunmore's letter reached Lady Agnew, the contract of hiring Alexander was complete,—the offer on the part of Alexander being met by an intimated acceptance on the part of the Countess. No subsequent letter from the Countess to Lady Agnew could annul what had passed by the mere circumstance of its being delivered, at the same time with the first, into the hands of Alexander. I do not think the servant could have retracted after the first letter reached Lady Agnew; and if she was bound, it seems clear that the Countess could not be free.

LORD GILLIES. I am decidedly of the opinion first expressed. Lady Agnew received a letter desiring her to engage a servant for Lady Dunmore. She proceeds to take steps towards this by putting a letter into the post-office for the purpose of making the engagement. But, before this letter reaches its destination, her authority to hire the servant is recalled; and, by the help of an express, she forwards the recall, so that it is eventually delivered through the same post with the former letter, and both reach the servant at once. They thus neutralize each other, precisely as in the case put by Lord Balgray, of an order and a countermand being sent through one post to an agent. I am therefore for adhering.

LORD PRESIDENT. I concur with the majority. There was no completed contract here, and Lady Dunmore was at liberty to resile as she did.

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## IN RE NATIONAL SAVINGS BANK ASSOCIATION.

### HEBB'S CASE.

IN CHANCERY, MAY 1, 1867.

[Reported in *Law Reports*, 4 *Equity*, 9.]

THIS was an application by Henry Kirke Hebb, that his name might be removed from the list of contributories of the National Savings Bank Association, a company formed under the Joint Stock

Companies' Act, 1856, and now being wound up under the Companies' Act, 1862.

On the 28th of August, 1857, Hebb signed and gave to the agent of the company at Lincoln an application for ten shares in a form provided by the company, and at the same time paid to the agent a deposit of 5s. per share, for which the agent gave him a receipt, with a memorandum that a duly authorized receipt would be forwarded from the head office within eight days.

On the 4th of September, 1857, the directors allotted ten shares to Hebb, and entered his name in the allotment book, and on the same day sent to their agent at Lincoln the letter of allotment with a receipt for the deposit signed by two directors, but the agent did not deliver the letter and receipt to Hebb until the 9th of September. In the meantime, on the 8th of September, Hebb wrote a letter to the directors, withdrawing his application, and requesting the return of the deposit.

On the 26th of August, 1858, Hebb having insisted upon repudiating the allotment, and threatened to sue the company for the deposit, the directors paid him the deposit. The allotment was not formally cancelled, and Hebb's name remained on the register of shareholders, but he had no further communication from the company until June, 1866, when the company was ordered to be wound up.

Mr. *De Gex*, Q. C., for the applicant.

First. The applicant never became a shareholder within the meaning of the Joint Stock Companies' Act, 1856, § 19, inasmuch as he never accepted any shares, having withdrawn his application before its acceptance by the directors was communicated to him. A contract is not binding until the party who has made the proposal has received from the other party notice that the latter has accepted it, *Routledge v. Grant* (a). So long as the letter of allotment remained in the hands of their agent the company might have cancelled the allotment, and the applicant could not have compelled them to give him the shares, and, on the other hand, he was entitled to withdraw his application.

[Mr. *Roxburgh*, Q. C., *amicus curiæ*. In *Pellatt's Case* (b), although there was no decision upon the point, the Lords Justices expressed an opinion that notice of allotment was necessary to complete the contract, and that in *Bloxam's Case* (c) the decision must have been founded on the assumption that *Bloxham* knew of the allotment, though he had no formal notice.]

Secondly. If there was a binding contract, it was annulled when the deposit was returned, and it has been so treated by both parties ever since. It was competent to the company to annul it, and the directors could exercise this power on behalf of the company. *Ex parte*

(a) 4 Bing. 683.

(b) Law Rep. 2 Ch. 527.

(c) 33 L. J. (Ch.) 519, 574.

Beresford (*a*); *Ex parte* Miles (*b*). Where there is a *bond fide* dispute as to the validity of a contract to take shares, the directors may compromise it, or release the alleged shareholder from the contract. Lord Belhaven's Case (*c*). And even if the directors had no such power, the consent of the shareholders would be presumed after the lapse of so many years. Brotherhood's Case (*d*).

Mr. *Baggallay*, Q. C., and Mr. *J. Napier Higgins*, for the official liquidator.

First. The contract was complete as soon as the shares were allotted. The directors could not, either as against the applicant, or as against the other shareholders, have recalled the allotment, whether or not it had been notified to the applicant, and the applicant might at any time after the 4th of September, 1857, have enforced specific performance. It has never been decided that notice of acceptance is necessary to complete a contract. In *Routledge v. Grant* (*e*) there was no acceptance of the offer; in *Ex parte* Miles (*f*), before any allotment was made, both parties agreed to vary the contract; in *Pellatt's Case* (*g*) there was no decision on this point. In *Dunlop v. Higgins* (*h*) it was held that a contract was complete as soon as a letter was posted accepting the offer. [They also referred to *Chitty on Contracts* (*i*).

Secondly. If the contract was binding, the applicant, having become a shareholder, could only be released by the consent of every shareholder. *Spackman's Case* (*j*); *Stanhope's Case* (*k*). In Lord Belhaven's Case (*l*) the deed of settlement expressly empowered the directors to compromise suits, and Lord Belhaven paid a sum of money to be released from the alleged contract; here there was no such power, and in fact there was no compromise.

LORD ROMILLY, M. R. I think that Mr. Hebb is not a contributory of this company. The mere writing of a line in a book is not, in my opinion, an irrevocable act; and if a person applies for shares in a company, and the directors write down his name in the allotment book, they may at any time before the allotment has been communicated to the allottee alter or cancel the allotment; if it were not so, a mere accident might irrevocably bind the company.

These applications for and allotments of shares must be treated upon the same principles as ordinary contracts between individuals. If A. writes to B. a letter offering to buy land of B. for a certain sum of money, and B. accepts the offer, and sends his servant with a letter containing his acceptance, I apprehend that until A. receives the letter, A. may withdraw his offer, and B. may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether;

(*a*) 2 Mac. & G. 197.

(*b*) 34 L. J. (Ch.) 123.

(*c*) 3 D. J. & S. 41.

(*d*) 31 Beav. 365; on appeal, 8 Jur. (N. S.) 926. (*e*) 4 Bing. 653. (*f*) 34 L. J. (Ch.) 123.

(*g*) Law Rep. 2 Ch. 527.

(*h*) 1 H. L. C. 381.

(*i*) Pages 9 *et seq.* (5th edit.).

(*j*) 11 Jur. (N. S.) 207.

(*k*) Law Rep. 1 Ch. 161.

(*l*) 3 D. J. & S. 41.

he is not bound by communicating the acceptance to his own agent. *Dunlop v. Higgins* (a) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties. In the present case, if Mr. Hebb had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority, and as he had withdrawn his original offer before he received the letter of the directors, the position of the parties was changed, and that letter became an offer which required the acceptance of Mr. Hebb to constitute a binding contract.

In *Martin v. Mitchell* (b) Sir T. Plumer says, "When one party, having entered into a contract that has not been signed by the other, afterwards repents, and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus poenitentiae*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? And can it be complete as to the one, and not as to the other?" I am of opinion that an offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent. Consequently, in my opinion, Mr. Hebb never became a shareholder; but if he had once become a shareholder, I should have felt a difficulty in holding that he had been released from that position by the subsequent return of the deposit. His name must be removed from the list of contributories, and both he and the official liquidator must have their costs out of the estate.

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## IN RE IMPERIAL LAND COMPANY OF MARSEILLES.

### HARRIS' CASE.

IN CHANCERY, MAY 3, 24, 1872.

[*Reported in Law Reports, 7 Chancery Appeals, 587.*]

In February, 1866, the prospectus of a company in London, called the Imperial Land Company of Marseilles, Limited, was published, requiring applicants for shares to pay £1 per share on application and £4 on allotment and stating that interest at the rate of 10 per cent. per annum would during the construction of the works be paid to the shareholders.

Mr. Lewis Harris of Dublin, filled up a letter of application for shares as follows:—

(a) 1 H. L. C. 381.

(b) 2 Jac. & W. 413, 428.

"To the Directors of the Imperial Land Company of Marseilles, Limited.

"Gentlemen,—having paid to your credit with the National Bank the sum of 200*l.*, being the deposit of 1*l.* per share on 200 shares in the above company, I request that you will allot me 200 shares of 20*l.* each in the Imperial Land Company of Marseilles, Limited, and I hereby undertake to accept the same, or any smaller number which you may allot to me, and to pay the balance, 19*l.* per share, thereon; and I agree to become a member of the company, and request you to place my name on the register of members, in respect of the shares allotted to me.

"I am, Gentlemen,

"Your obedient servant,

"Name in full : Lewis Harris.

"Address in full : 19 Suffolk Street, Dublin.

"Profession : Bill broker.

"Usual signature : L. Harris.

"Date : 5th March, 1866."

This letter was sent by Mr. Harris to the directors through a bank, and was duly received. The directors appointed a committee to allot the shares, and 100 shares were allotted to Mr. Harris (a). A letter from the secretary of the company, containing notice of this allotment, addressed to Mr. Harris at his Dublin address, was put into the post-office at Lombard Street. There was some dispute as to the exact time of posting, but the letter was posted either on the 15th or very early in the morning of the 16th of March, 1866, and was received by Mr. Harris at Dublin on the 17th. This letter, after stating that the directors had allotted to Mr. Harris 100 shares in the company, on which a balance of 300*l.* was payable to the bankers of the company not later than the 21st of March, 1866, proceeded thus:—

"As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum."

On the 16th of March Mr. Harris had written, and put into the post at Dublin, the following letter addressed to the directors in London, declining to accept shares in the company:—

"Gentlemen,—On the 5th of March instant I paid to your credit

(a) The articles of association of the company provided for the appointment of a board of directors, and contained the following clauses:—Sect. 7 : "The shares shall be allotted by and at the discretion of the board." Sect. 87: "The directors may delegate any of their powers to committees consisting of such number of the members of their body as the directors may think fit."

into the National Bank, Dublin, 200*l.*, being a deposit of 1*l.* per share on an application for 200 shares in the above company. I hereby give you notice that, inasmuch as up to this date I have received no allotment, I hereby withdraw the aforesaid application, and request you will forthwith return me my deposit of 200*l.*, as I shall not accept any shares now allotted, or hold myself in any way liable."

The secretary of the company answered on the 17th of March that it was too late to withdraw the application for shares; and Mr. Harris's name was placed on the register of members as holding 100 shares. Mr. Harris, however, by his solicitors continued to deny that he was a shareholder, and much correspondence passed on the subject.

An order was made for winding up the company and Mr. Harris, and two other persons in a similar position, on the 23rd of July, 1869, took out a summons to have their names removed from the list of contributories.

The Vice-Chancellor Malins dismissed the summons (*a*), and Mr. Harris appealed.

Mr. *Cole*, Q. C., and Mr. *Everitt* for the Appellant:—

(*a*) 1872. March 4.

SIR R. MALINS, V. C., after stating the facts of the case, said, that the first serious objection which had been made on behalf of Mr. Harris was that the allotment was altogether invalid as having been made by a committee, and not by the board of directors; and the 7th clause of the articles, stating that the shares were to be allotted by and at the discretion of the board, was relied upon. This was a very serious objection, for if it prevailed the whole allotment was invalid. But the 87th clause provided for the delegation by the directors of their powers to committees. It was therefore clear that the directors might so delegate the duty of allotting shares, and it was very proper that they should do so. On this point *Howard's Case* (Law Rep. 1 Ch. 561) was referred to, but in that case there was no valid delegation of authority, and it did not affect the present case. This objection had altogether failed.

Then as to the question of acceptance, and as to when a letter of acceptance became binding. His honor then stated the facts in the case of *Dunlop v. Higgins* (1 H. L. C. 381), and said that if it was the law that a letter was not binding until it was received, then *Dunlop & Co.* could not have been held to be bound. In *British and American Telegraph Company v. Colson* (Law Rep. 6 Ex. 108) the letter of allotment was never received. The facts of the present case came to this: The offer made on the 5th of March was a continuing offer on the 15th, when it was duly accepted. The allotment of shares was made and duly communicated to Mr. Harris by a letter posted before he wrote the letter repudiating the shares. The contract was, therefore, at all events, complete when the letter of allotment was posted, and his letter of repudiation was too late, for he was bound by his letter of acceptance.

The next point relied upon was that the letter of allotment fixed the 21st of March for payment of the call, and provided for payment of interest if the calls were not punctually paid; and this, it was said, introduced a new term. But fixing the 21st of March instead of the date of the allotment, was an extension of time in favor of the allottee; and as to interest, the allottee was to receive interest, and could anything be more reasonable than telling him that he must pay, or, in other words would not receive interest unless he paid the money? This was not the introduction of a new term, but a reasonable intimation. The case of the *Oriental Inland Steam Company v. Briggs* (4 D. F. & J. 191) was unlike this, as a new and unusual term was certainly introduced in that case. In *Peek's Case* (Law Rep. 4 Ch. 532) the allottee was held to his contract.

All the objections had failed, and Mr. Harris's name must remain on the list, and he must pay the costs of the summons.

We say that the contract to take shares was not binding until the letter allotting them was received: *British and American Telegraph Company v. Colson* (a); *Townsend's Case* (b); *Hebb's Case* (c). No doubt there have been cases where a contract has been held complete when the letter accepting an offer has been posted; but these were all mercantile cases, in which the law is necessarily different. Until the letter has reached its destination, the acceptance may be retracted: *Dunlop v. Higgins* (d).

Moreover, the letter of allotment is not a simple acceptance, but introduces a condition as to interest which is a new term: *Oriental Inland Steam Company v. Briggs* (e); *English and Foreign Credit Company v. Arduin* (f).

Another objection is, that the allotment is void as being made by a committee instead of by the directors, in direct contravention of the seventh clause of the articles.

Mr. *Glasse*, Q. C., and Mr. *Higgins*, Q. C. for the liquidators, were not called upon.

SIR W. M. JAMES, L. J. :—

I feel no doubt whatever as to the propriety of the judgment of the Vice-Chancellor in this case.

Three grounds have been taken on behalf of the Appellant. One is, that upon the construction of the articles of association the allotment was invalid, because it was made by a committee of the directors. But the articles have in terms provided that the directors might delegate anything to a committee; and that they did delegate this duty to this committee appears in evidence before us. It was a proper and reasonable mode of dealing with such a thing as the investigation of the applications for shares and the allotment of them. It appears to me, therefore, that there is nothing in that ground of appeal.

The second ground is that on which the greater part of the argument has been addressed to us; that there was a letter posted in Dublin recalling the application for shares before the letter posted in London containing the notice of the allotment was received in Dublin; the letter of revocation not being in the course of post capable of arriving in London before the letter of allotment was actually posted by the company.

Now it appears to me that the Vice-Chancellor's decision is correct, and that the contract was completed the moment the notice of allotment was committed to the post addressed to the address in Dublin which Mr. Harris himself had given. That decision seems to me to be entirely in accordance with a great number of cases in this Court, and

(a) Law Rep. 6 Ex. 108.  
(d) 1 H. L. C. 381.

(b) Ibid. 13 Eq. 148.  
(e) 4 D. F. & J. 191.

(c) Ibid. 4 Eq. 9.  
(f) Law Rep. 5 H. L. 64.



to be utterly undistinguishable, in principle or in fact, from *Dunlop v. Higgins* (a), a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is in fact the decision in *Hebb's Case* (b), though in that particular case a distinction was taken by the Master of the Rolls that the company chose to send the letter to their own agent, which agent had not been authorized by the applicant to receive it on his behalf.

Against this current of authority there is the case of *British and American Telegraph Company v. Colson* (c), in which the Court of Exchequer—not disputing the authority of the previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords—established a distinction which does not apply to this case at all. The Court there held that although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the post-office, the letter never arrives at all, then there is a difference.

It seems to me not necessary to express any opinion as to whether that distinction is sound or not, but that was the ground upon which the Judges proceeded in that case. In this case the letter did arrive, and having arrived the contract was complete, and could not be revoked, from the time when the letter was posted. It was completed in exactly the way which the Appellant desired, that is to say, he gave his address in Dublin, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post. That is a complete contract. It does not signify what was the particular hour of arrival of the one letter or the other, or which was the first, the delivery in London or the delivery in Dublin. That appears to me wholly immaterial, because the contract was completed at the time when the letter of allotment was properly posted by the company.

The other point raised was, that there was a condition annexed to this allotment letter, and on this point the case of *English and Foreign Credit Company v. Arduin* (d) was cited. Now the facts in that case were such as persons might differ about, and the Exchequer Chamber held one way while the house of Lords held another way. But the principle upon which they all proceeded, which is the only thing we have to deal with, was, that where there is an acceptance of an offer, if there is to be a term or condition imposed, it must be clearly so stated, otherwise it is to be considered simply as a notification which

(a) 1 H. L. C. 381, (b) Law Rep. 4 Eq. 9. (c) Law Rep. 6 Ex. 108. (d) Law Rep. 5 H. L. 64.

may have such effect as it ought to have in a Court of Law. Here the acceptance was unqualified :—[His Lordship read the letter of allotment.] It appears to me that the statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent., but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorized to receive payment, but not otherwise. It is a mere notification, not intended to be a new stipulation, and it never was considered by the Appellant, or by anybody who received such a letter, as a new term introduced. It would be contrary to the usage of all mankind to treat this as being the introduction of a new term, altering or affecting the express acceptance of the application for shares.

I am of opinion, therefore, that the order of the Vice-Chancellor is right, that on all the grounds this appeal has failed, and must be dismissed with costs.

SIR G. MELLISH, L. J. :—

I am of the same opinion, and I agree with what the Lord Justice has said on the first and the last grounds, and also on the second ground. The only part of the case upon which I wish to add any observations is on the second ground, which raises a question of very great general importance, and that is this : When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a complete contract made ? Is it made at the time when the letter accepting the offer is put into the post, or is it not made until that letter is received ? It was contended before us that it is not made until the letter is received ; so that until it is received the contract may be revoked by the person who has made the offer.

Now throughout the argument I have been forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has received a letter making him an offer, and has accepted the offer, could safely act on that acceptance after he has put it into the post until he knew that it had been received. Every day, I presume, there must be a large number of mercantile letters received which require to be acted upon immediately. A person, for instance, sends an order to a merchant in London offering to pay a certain price for so many goods. The merchant writes an answer accepting the offer, and

goes that instant into the market and purchases the goods in order to enable him to fulfil the contract. But according to the argument presented to us, if the person who has sent the offer finds that the market is falling, and that it will be a bad bargain for him, he may at any time, before he has received the answer, revoke his offer. The consequences might be very serious to the merchant, and might be much more serious when the parties are in distant countries. Suppose that a dealer in Liverpool writes to a dealer in New York and offers to buy so many quarters of corn or so many bales of cotton at a certain price, and the dealer in New York, finding that he can make a favorable bargain, writes an answer accepting the offer. Then, according to the argument that has been presented to us to-day, during the whole time that the letter accepting the offer is on the Atlantic, the dealer who is to receive it in Liverpool, if he finds that the market has fallen, may send a message by telegraph and revoke his offer.

Nor is there any difference between an offer to receive shares and an offer to buy or sell goods. And yet, if the argument is sound, then for nearly ten days the buyer might wait and speculate whether the shares were rising or falling, and if he found they were falling he might revoke his offer. Those consequences are very extraordinary, and I always understood the law to be the other way until the case of *British and American Telegraph Company v. Colson (a)*, which has caused some doubt on the subject.

I will shortly refer to the previous cases on the subject. The first case is *Adams v. Lindsell (b)*. No doubt there were two points in that case. An offer was sent by post, but the letter was misdirected through the mistake of the party who sent it, and therefore did not arrive until two days afterwards. And that point was disposed of during the argument, that inasmuch as it was the fault of the party sending it, the answer having been written and posted as soon as it did arrive, no advantage could be taken of the delay caused by the misdirection. But the person who sent the offer, finding no answer had arrived, sold the goods before the answer had arrived, and then it was argued that until the answer was actually received there could be no binding contract between the parties, and therefore no breach of it. But the Court of King's Bench said that if the law was so, "no contract could ever be completed by the post. For if the Defendants were not bound by their offer when accepted by the Plaintiffs till the answer was received, then the Plaintiffs ought not to be bound till after they had received the notification that the Defendants had received their answer and assented to it; and so it might go on *ad infinitum*." That appears to me to be at any rate an expression of opinion on the part of the Court there, that when an offer is made by letter,

(a) Law Rep. 6 Ex. 108.

(b) 1 B. & A. 681.

and is accepted by a letter which is posted, then there is a binding contract between the parties from the time when the letter is posted.

In *Dunlop v. Higgins* (a) the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*, and the House of Lords approved of the ruling in that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonor given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken v. Collin* (b) as an authority on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonor of a bill of exchange. He then referred to the case of *Adams v. Lindsell*, (c) and quoted the observation of Lord Ellenborough. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post.

There is then the case of *Duncan v. Topham* (d), in which there were no doubt several questions, on one of which whether posting the acceptance was sufficient, Mr. Justice Cresswell told the jury that if the letter accepting the contract was put into the post-office, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete. There was then a motion for a new trial, and though Mr. Baron Bramwell, in *British and American Telegraph Company v. Colson* (e), has said that he thought the case not properly reported, still it appears as if Mr. Justice Maule and Chief Justice Wilde both assented to the ruling of Mr. Justice Cresswell and refused the rule on that point.

In addition to that, there is the case of *Potter v. Sanders* (f), which is also a direct decision of a Court of Equity on the point.

Against them there is simply this case of *British and American Telegraph Company v. Colson*, and that is not a direct decision on this point. The Lord Chief Baron, in the course of his judgment, says, it may be that if the letter arrives in time, then the contract will be treated as having been made from the time when the letter was put into the post; but I do not see how there can be any relation back in a case of this kind, as there may be in bankruptcy. If the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. Still that case is not a direct decision on the point before us, though I confess I have great difficulty in reconciling it with the previous decision in *Dunlop v. Higgins* (g). That case was commented on at considerable length both by the Lord Chief Baron and by Baron Bramwell, but they only commented on the facts of the case, and showed—which I think they did

(a) 1 H. L. C. 381. (b) 7 M. & W. 515. (c) 1 B. & A. 681. (d) 8 C. B. 225.  
(e) Law Rep. 6 Ex. 108. (f) 6 Hare, 1. (g) 1 H. L. C. 381.

show—that according to the facts of the case the Plaintiff might very well have had a verdict, even if the rule of law had been that the contract was not made until the letter arrived, because there the only thing which prevented the arrival of the letter was the bad weather, which made the mail very late. And therefore I agree, upon the facts of that case, that the Plaintiff might have recovered, even although the law was that the contract was not made until the letter arrived. But then the real question before the House of Lords in *Dunlop v. Higgins* was, whether the ruling of the Lord Justice General was correct in point of law, and the House of Lords held that it was correct.

However, I agree with the Lord Justice that it is not necessary to give any decisive opinion on the point, because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted. That, however, is not the case before us; the letter did arrive in due time; and the question is whether, under that state of circumstances, the parties are bound by the contract.

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### THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) v. GRANT.

IN THE COURT OF APPEAL, MAY 22, JULY 1, 1879.

[*Reported in 4 Exchequer Division, 216.*]

ACTION to recover 94*l.* 15*s.* being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares dated the 30th of September, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiff's company, which stated that the defendant had paid to the bankers of the company 5*l.*, being a deposit of 1*s.* per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favor of the defendant, which was posted addressed to the defendant at his residence 16 Herbert Street, Swansea, Glamor-

ganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the 5*l.* mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of 5*l.* for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.* was also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury.

1. Was the letter of allotment of the 20th of October in fact posted?

2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins* (a).

The defendant appealed.

May 22. *Finlay* and *Dilhryn*, for the defendant, contended that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received was not a communication to the defendant of the allotment, and that there was therefore no contract between the parties.

*Wilberforce*, and *G. Arbuthnot* (*W. G. Harrison*, Q. C., with them), for the plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post-office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: *Reidpath's Case* (b); *Townsend's Case* (c); *Wall's Case* (d); *Gunn's Case* (e); *Dunmore v. Alexander* (f); *Pellatt's Case* (g); *Ex parte Cote* (h); *Taylor v. Jones* (i); Pollock on the Law of Contracts, p. 13.

*Cur. adv. vult.*

July 1. The following judgments were delivered:—

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| (a) 1 H. L. C. 381.     | (b) Law Rep. 11 Eq. 86. | (c) Law Rep. 13 Eq. 148.  |
| (d) Law Rep. 15 Eq. 18. | (e) Law Rep. 3 Ch. 40.  | (f) 9 Shaw & Dunlop, 190. |
| (g) Law Rep. 2 Ch. 527. | (h) Law Rep. 9 Ch. 27.  | (i) 1 C. P. D. 87.        |

THESIGER, L.J. In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court.

The leading case upon the subject is *Dunlop v. Higgins* (a). It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so the Court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonor posted by the holder of a bill of exchange in proper time, in which case he said (b), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop v. Higgins* (a) is that taken by James, L.J., in *Harris' Case* (c), there (d) he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment," he adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding

(a) 1 H. L. C. 381. (b) 1 H. L. C. at p. 399. (c) Law Rep. 7 Ch. 587. (d) At p. 592.

himself to that offer, then the contract is complete and neither party can afterwards escape from it." Mellish, J., also took the same view, he says (a) "in *Dunlop v. Higgins* (*supra*) the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell* (b). The House of Lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange notice of dishonor, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken v. Collin* (c) on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonor of a bill of exchange. He then referred to the case of *Adams v. Lindsell* (b), and quoted the observation of Lord Ellenborough, C.J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris' Case* (*supra*) for the moment, I turn to *Duncan v. Topham* (d), in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post-office and lost by the negligence of the post-office authorities, the contract would nevertheless be complete; and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop v. Higgins* (*supra*). That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins* (*supra*) were out of the way, *Harris' Case* (*supra*) would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v. Lindsell* (b), which is recognized authority upon this branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without

(a) At p. 595.

(b) 1 B. &amp; A. 681.

(c) 7 M. &amp; W. 515.

(d) 8 C. B. 225.



being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (a), when in the course of his judgment he said: "*Dunlop v. Higgins* (b) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is that the post-office is the common agent of both parties." Alderson, B. also in *Stocken v. Collin* (c), a case of notice of dishonor, and the case referred to by Lord Cottenham, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the *British and American Telegraph Co. v. Colson* (d), which was a case directly on all fours with the present, and in which Kelly, C.B. (e), is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the Court, if the letter of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders* (f). And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L.J., in *Harris' Case* (g) how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was

(a) Law Rep. 4 Eq. at p. 12. (b) 1 H. L. C. 381. (c) 7 M. & W. at p. 516.  
 (d) Law Rep. 6 Ex. 108. (e) At p. 115. (f) 6 Hare, 1. (g) Law Rep. 586, p. 596.

actually made at the time when the letter was posted. The principle indeed laid down in *Harris' Case* (a) as well as in *Dunlop v. Higgins* (b), can really not be reconciled with the decision in the *British and American Telegraph Co. v. Colson* (c). James, L. J., in the passage I have already quoted (a) affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers, with approval, to *Hebb's Case* (e). There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent they had sent it through the post-office, the applicant would have been bound although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favor of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the *British and American Telegraph Co. v. Colson* (c), that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract as he says (f), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden v. Directors of Metropolitan Ry. Co.* (g), "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to

(a) Law Rep. 586, at p. 596.     (b) 1 H. L. C. 381.     (c) Law Rep. 6 Ex. 108.

(d) *Harris' Case*, Law Rep. 7 Ch. 592.     (e) Law Rep. 4 Eq. 9.     (f) At p. 596.

(g) 2 App. Cas. 666, 691.

adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Taylor v. Merchants' Fire Insurance Co.* (a), more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L. J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop v. Higgins*, in the House of Lords (b), and *Harris' Case* (c), in the Court of Appeal in Chancery, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Lopes, J., was of opinion that the principle was applicable

(a) 9 Howard S. Ct. Rep. 390.

(b) 1 H. L. C. 331.

(c) Law Rep. 7 Ch. 537.

to such a case, and gave judgment in favor of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal the defendant relies upon the decisions of the Court of Exchequer in the case of the *British and American Telegraph Co. v. Colson* (a), to which, for conciseness, I will refer as *Colson's Case* (a). I propose to consider *Dunlop v. Higgins* (b), and *Colson's Case* (a) and *Harris' Case* (c) somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's Case* (a) is consistent with the decisions of the House of Lords and the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop v. Higgins* (b) were as follows: After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2000 tons of iron pigs at 65s. per ton net. This letter reached Higgins & Co. at 8 A. M. on the 30th of January, and on the same day they replied by letter duly addressed to Dunlop & Co. in the following terms: "We will take the 2000 tons pigs you offer us."

It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P. M. on the 30th, and that the post next following left at 1 A. M. of the 31st, and also that a letter despatched by the former post would in due course arrive at Glasgow at 2 P. M. on the 31st, and by the latter in time to be delivered at 8 A. M. on the first of February. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 P. M. post, and was despatched by the 1 A. M. post on the 31st. In due course it should have been delivered in Glasgow at 8 A. M. on the first of February, but it was not in fact delivered until 2 P. M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared, also, that Higgins & Co., by mistake, dated their letter as of the 31st of January instead of the 30th of January. On the 1st of February, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co., "We have your letter of yesterday's date, but are sorry that we cannot now enter the 2000 tons, our offer not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of the 28th should have been answered by the first post, viz., by that which left Liverpool at 3 P. M. on the 30th, but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 P. M. on the 1st of February.

(a) Law Rep. 6 Ex. 108.

(b) 1 H. L. C. 381.

(c) Law Rep. 7 Ch. 587.

On the trial before the Lord Justice General, he admitted evidence to show that the letter of acceptance, though dated the 31st, was in fact written and posted on the 30th of January, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post-office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session and thence to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were therefore taken by the defendants, and, amongst other grounds of exception, they objected to the admission of evidence as to the posting of the letter on the 30th of January, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were not responsible for any casualties in the post-office establishment. During the argument Lord Cottenham said, "The question is whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive"; and, in moving the judgment of the House, he observed, "if a man does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do; how can he be responsible for that over which he has no control?" There is nothing in the language of Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening

at the post-office he is not responsible." Having regard to the passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I desire however to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins* (a), which has been sometimes adopted, and as I think without sufficient reason, viz., that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop v. Higgins* (a). On the contrary, I think that the principle established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop v. Higgins* (a) the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding it as a fact that Higgins & Co. posted their acceptance of the offer to Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the judge. The principle involved in *Dunlop v. Higgins* (a) was recognized by Cresswell, J. upon the trial of the action in *Duncan v. Topham* (b); upon that occasion he directed the jury that, if the letter accepting the contract was put into the post-office and lost through the negligence of the post-office authorities, the contract would nevertheless be complete; and upon an application in the same case, to make absolute a rule which had been obtained for a new trial, though the new trial was ordered upon other grounds, Wilde, C. J., and Maule, J., expressed views to the same effect as the direction of Cresswell, J.; in that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's Case* (c), they were as follows. On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2*l.* per share on whatever number should be allotted to him; on the 15th of the same month fifty shares were allotted to him, and a letter informing him of

(a) 1 H. L. C. 381.

(b) 8 C. B. 225.

(c) Law Rep. 6 Ex. 108.

such allotment was posted to his address, as given in his letter of application for shares viz., 31 Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post, as was expressed by Lopes, J., in the case now under consideration; such would be the ordinary mode of transmission of an allotment letter. The defendant however swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street: about that time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th of February the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2*l.* per share. The jury found that the letter of allotment was posted to the defendant on the 14th of February but that he never received it, and that the second notice was not sent in a reasonable time. The learned judge, Bramwell, B., thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case* (a) which had recently been decided by Lord Romilly. A rule nisi was accordingly obtained, and cause was shown on the 17th of November, 1870, the Court being composed of the Lord Chief Baron and Bramwell and Pigott, BB. Judgment was reserved, and on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant.

The Lord Chief Baron, in the course of his judgment, expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except in certain cases where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put by the Lord Chief Baron is to be read with some qualifications, it can hardly be considered as consistent with the decision in *Dunlop v. Higgins* (b), as such decision has ordinarily been understood. This view, however, taken by him of that decision does not appear to be in accordance with that generally taken for after alluding to the circumstances of *Dunlop v. Higgins* (b) he

(a) 17 W. R. 813.

(b) 1 H. L. C. 381.

proceeded to express his entire concurrence with the decision of the Court of Session and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached *Dunlop & Co.* in time, and that the House of Lords had acted upon the same view of the circumstances of the case; the distinction which he recognized between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop v. Higgins (a)* was received by the party making the offer in due time, that in *Colson's Case (b)* never reached its destination. Pigott, B., did not give a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Bramwell, B., also commented upon the circumstances of *Dunlop v. Higgins (a)*, and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted, and he then expressed himself as follows: "It seems to me that the correct way to deal with those expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between the parties it must be subject to those delays which are unavoidable." It would appear, then, that all the judges in the Court of Exchequer treated the case of *Dunlop v. Higgins (a)* as one decided upon special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop v. Higgins (a)* sufficient to have justified the decision of the House, irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other conclusion than that the decision in *Colson's Case (b)* is inconsistent with that of the House of Lords in *Dunlop v. Higgins (a)*. If I am right in this conclusion it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris' Case (c)*, which came before the Lords Justices in 1872. On the 5th of March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 16th of March

(a) 1 H. L. C. 381.

(b) Law Rep. 6 Ex.108.

(c) Law Rep. 7 Ch. 587.



posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Malins, V.C. From such dismissal Mr. Harris appealed, but the decision of the Vice-Chancellor was upheld. In giving judgment James L.J., said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post, and a similar view was expressed by Mellish, L.J., who, after referring to the decision of the Court of Exchequer in *Colson's Case (a)*, and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop v. Higgins (b)*, observed, with reference to the last mentioned case, that the real question then before the House of Lords was, whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in *Harris' Case (c)*, was not necessarily inconsistent with that of the Court of Exchequer in *Colson's Case (a)*, but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognized the propriety of the distinction drawn by the Court of Exchequer between *Dunlop v. Higgins (b)* and *Colson's Case (a)*. I do not think it necessary to refer to *Finucane's Case (d)* and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that in *Finucane's Case (d)* *Dunlop v. Higgins (b)*, and *Duncan v. Topham (e)* were not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop v. Higgins (b)*. Indeed, in one of those cases, *Hebb's Case (f)*, he distinctly recognized the authority of the decision in *Dunlop v. Higgins (b)*, which he considered to have been decided upon the ground that the post-office was the common agent of both parties. For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in *Dunlop v. Higgins (b)* is applicable to the case now under consideration, and that the decision of Lopes, J., should be affirmed. I desire, therefore, to add

(a) Law Rep. 6 Ex. 108.

(b) 1 H. L. C. 381.

(c) Law Rep. 7 Ch. 587.

(d) 17 W. R. 813.

(e) 8 C. B. 225.

(f) Law Rep. 4 Eq. 9.

that I have felt myself bound by authority. My own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of these principles in certain suggested cases, as the equally forcible remarks made by Mellish, L. J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L. J. The question in this case is not whether the post-office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C. J., and Lord Blackburn: *Brogden v. Metropolitan Ry. Co.* (a).

(a) 2 App. Cas. at p. 692. The following is the passage referred to:—"But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV., Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the Plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them; that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on Contracts of Sale, and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: "This plea is clearly bad, as you have not shown the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the Plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, i. e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, e. g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by check or banknote, and posts a letter containing a check or banknote to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and banknotes to his banker by post, and posts a letter containing checks and banknotes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and

and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my Lords, that that, which was said 300 years ago and more, is the law to this day, and it is quite what Lord Justice Mellish in *Ex parte Harris* accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up our mind on the subject." *Ed.*

banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C. J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted: his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post-office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the

other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is indeed a case recently reported in the *Times*, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn," makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L. J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in existence before the *British and American Telegraph Co. v. Colson* (a). But I wish to say a word as to *Dunlop v. Higgins* (b); the

(a) Law Rep. 6 Ex. 108.

(b) 1 H. L. C. 381.

whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop v. Higgins* (a) decided nothing contrary to the defendant in this case. Mellish, L.J., in *Harris' Case* (b), says, "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the *British and American Telegraph Co. v. Colson* (c) with *Dunlop v. Higgins* (a). I do not share that difficulty. I think they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in *Harris' Case* (b) might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop v. Higgins* (a) was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the *British and American Telegraph Co. v. Colson* (c). Since the last case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justice had in *Harris' Case* (b) thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Lopes J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if

(a) 1 H. L. C. 381.

(b) Law Rep. 7 Ch. 596.

(c) Law Rep. 6 Ex. 108.

the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins* (a), and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C. J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, i. e. must reach him.

*Judgment affirmed.*

(a) 1 H. L. C. 381.

CHAPTER IV.\*  
FORM OF CONTRACT.  
SECTION I.—CONTRACT UNDER SEAL.

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STEFANOS XENOS AND ANOTHER . . . . . APPELLANTS  
AND  
FRANCIS D. WICKHAM . . . . . RESPONDENT.

IN THE HOUSE OF LORDS, JUNE 25, 26, 1866, MAY 8, JULY 16, 1867.

[*Reported in Law Reports, 2 English and Irish Appeals, 296.*]

THIS was an appeal against a decision of the Court of Exchequer Chamber (*a*) which (*diss.* Mr. Justice Blackburn and Mr. Justice Mellor) had affirmed a decision of the Court of Common Pleas (*b*) in an action between these parties on a time policy on a ship.

The Appellants are shipowners, carrying on business under the name of the Greek and Oriental Steam Navigation Company, and as such were the owners of the ship *Leonidas*. The Respondent is the chairman and representative of the Victoria Fire and Marine Insurance Company. The declaration alleged, in the usual form, that the Plaintiffs caused their vessel to be insured by this company for the space of twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at £1000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. There was also a count in trover for the policy.

The Defendant pleaded several pleas, some of which alone are material. The first denied the insurance as alleged; the fourth stated that after the making of the policy the same remained, with the Plaintiff's consent, in the hands of the Defendant, and whilst it so remained, and before the loss, the Plaintiffs requested the Defendant, for the purpose of putting an end to the policy, to cancel the same and make

(*a*) 14 C. B. (N.S.) 435.  
(278)

(*b*) 13 C. B. (N.S.) 381.  
\* Ch. II, Sect. I, Finch.



a return to the Plaintiffs of the premium; that, in compliance with such request, and before the loss, the Defendant did cancel the policy and thereby put an end to the risk, &c. To the count in trover the Defendant pleaded not guilty, and not possessed.

Issue was taken on all these pleas, and the cause was tried before Lord Chief Justice Erle, when it appeared that on the 25th of April, 1861, the Plaintiffs employed Mr. Lascaridi, an insurance broker, to effect for them a policy on the ship *Leonidas* for £2000, at £8 8s. per cent., from the 25th of April to the 25th of October. In the case of private underwriters at Lloyd's, it is customary to have only one slip, which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

In accordance with the usual practice, Lascaridi prepared for the Respondent's company a slip embodying the terms of the proposed insurance, and got it initialed by Mr. E. J. Sprange, a clerk of the company, for the sum of £2000. This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the Plaintiffs sent to Lascaridi a letter, dated 29th of April, 1861, desiring him to "cancel *Leonidas* insurance, and insure the same for all the year and for all seas at £10 10s. per cent." On the 30th of April Lascaridi called at the Respondent's office, and stated that he did not wish the policy already mentioned to proceed, but desired to effect another. The slip for the insurance for £2000 for six months was then destroyed, and another slip was prepared by him, and initialed by the Respondent's clerk, "E. J. S.," on the *Leonidas* for £1000 for twelve months, from the 25th of April, 1861, on "hull, stores, and machinery, valued at £13,000." On the 1st of May Lascaridi sent to the Plaintiffs an account debiting them with the sum of £338, as payable by them in respect of insurances on the *Leonidas*, and drew on them, as of that date, for that sum at three months. They accepted the bill, and when they did so Lascaridi told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterwards a policy in the usual form of the company was filled up from the slip, and was dated the 1st of May, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums, and when insurances are effected (as this was) for cash, or on cash account, all premiums for insurances effected during each month are

payable on the 8th of the succeeding month. Just before the expiration of this credit a debit note is sent to the broker, with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On the 8th of June a debit note was sent from the Respondent's office to that of Lascaridi. On its being presented, Lascaridi's clerk said that no premium was due, and, upon a second messenger being sent with the policy, which was expressed to be duly "signed, sealed, and delivered," and the debit note, the clerk repeated the statement, and said that the policy ought not to have gone forward. In the course of the day one of the clerks of Lascaridi called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was thereupon indorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto. This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against Lascaridi for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of the 2nd of September, 1861, Lascaridi's clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the Baltic, there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day intelligence, by telegram, had been received at Lloyd's stating that the *Leonidas* was stranded on the Nervo, but this intelligence was not known to the Respondent till three o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the Appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from Lascaridi any part of the premium, or any credit for the same.

The Lord Chief Justice, on these facts, directed a verdict for the Defendant, but reserved leave to the Plaintiffs to move to enter a verdict for them if the Court should be of opinion that the policy was binding on the company, and had been cancelled without authority. A rule to that effect having been obtained, it was, after argument, discharged, and this decision was confirmed on appeal to the Exchequer Chamber. The present appeal was then brought.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Baron Piggot, and Mr. Justice Smith, attended.

Sir *George Honynman*, Q.C., and Mr. *Watkin Williams*, for the Appellants :—

The Judgment in the Court below was, that there never was a complete and binding contract between these parties. That proposition cannot be sustained. The policy was treated, except by Lord Chief Baron Pollock, as a common law deed, and it was supposed to require actual delivery to make it effectual. Formal delivery to the appellants, or even to a particular person on their behalf, is not essential for its validity: *Comyn's Digest* (a); *Rolle's Abridgment* (b). In *Exton v. Scott* (c), the grantor of a mortgage for years retained the deed in his own possession, and it was only discovered among his papers after his death, yet it was held not to be an escrow, but a deed, and took effect from its execution, and was good against his creditors. In *Hall v. Palmer* (d) a bond executed for the benefit of a woman with whom the grantor had cohabited, though retained in the hands of the testator's solicitor, and quite unknown to her till his death, was declared by the Vice-Chancellor Wigram to be valid for her benefit. So in *Fletcher v. Fletcher* (e), where a man had executed a deed in favor of his illegitimate son, though unknown to the son, and the deed was kept in the grantor's possession, and not discovered until after his death, it was held to entitle the son to sue his estate for the amount. *Doe d. Richards v. Lewis* (f) is to the same effect; and in *Kidner v. Keith* (g), a deed which, by arrangement, was to be executed in duplicate, was executed by the grantee, but not attested, and was sent in that state to the solicitor of the grantors to procure their execution, and they accordingly signed and delivered it; this was held to be sufficient, and the whole estate passed, the arrangement not rendering the deed a mere escrow till the duplicates should have been interchanged. In the case of a corporation, the act of putting the common seal to the deed is equivalent to the delivery. The policy here was treated by the parties themselves as having been duly delivered. It professes to have been "signed, sealed, and delivered" in the presence of the resident secretary, by two directors of the company, who declare themselves to have acted in accordance with the provisions of the deed of settlement of the company. Nothing more was required to make it a perfect and binding instrument. The retention of the policy by the officer of the insuring company, after it had been fully executed, would not prevent it from being complete. *Doe d. Garnons v. Knight* (h) is not distinguishable from the present. That case established that the execution of the deed and the formal act of delivery, by putting the hand on the seal, and saying, "I deliver this as my act and deed," made it binding as such, although the grantor, in fact, retained

(a) *Fait*, A. 2. (b) *Fait*, J. 1. (c) 6 Sim. 31. (d) 13 L. J. (N.S.) Ch. 352.  
(e) 14 *Ibid*. 66. (f) 11 C. B. 1035. (g) 15 C. B. (N. S.) 35. (h) 5 B. & C. 671.

it in his custody, and did not deliver it to the party who was to take, or to any one for his use.

As to the liability of the broker, it is clear that if he makes himself liable for the premiums, money had and received can be maintained on the policy, although in fact the premiums have not been paid at the time of the loss: *Power v. Butcher* (a); Arnould on Marine Insurance (b). If otherwise, it would follow that, should the ship be lost between the day of the execution of the policy and that for the payment of the premium, there would be no insurance, a proposition which could never be admitted.

The formal handing over of the policy of insurance is not necessary, for a policy is not like a bill of exchange, which may be revoked at any time before it is delivered; besides which, as Lord Campbell observed in *Humphrey v. Dale* (c), these matters must be looked at not solely according to the habits of lawyers, but with reference also to the usages and concerns of trade. Here all was done according to those usages, and it cannot be necessary to the validity of a policy of insurance that it should be obtained by the assured the moment the slip is signed. As soon as the slip was signed here the contract was complete, and the slip was in truth an agreement between the Plaintiffs and the Respondent, and not between the broker and the Respondent.

Then, as to the question whether, if the policy was completed, the broker had not, so far as the Respondent was concerned, authority to cancel it, and whether he had actually cancelled it. The Plaintiffs had never authorized the cancellation; that was admitted in the special case. The clerk had no right, without their authority, to cancel it. Lascaridi had never given him any authority to do so; and Lascaridi himself not having received authority from the Plaintiffs to cancel the policy, possessed no power to give him any. The person who is authorized to effect a policy does not thereby acquire authority to cancel it. The case states that the course with insurance companies is for the broker to prepare for each a slip, and the policy is afterwards filled up from that slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. That very usage assumes that the policy may continue with the insuring company, but yet the contract will be complete. The mere keeping possession of the policy, even if it had still remained in the possession of the company, which it did not, would, therefore, have amounted to nothing; but, in fact, the actual possession remained with the broker, who must be treated as having held it as the agent of his principals. The general authority of a broker is stated in Story on Agency (d), where it is shown (e), that though the broker, if the policy remains in his hands, may have, incidentally, authority to receive payment on a loss, he will

(a) 10 B. & C. 329. (b) Vol. i. p. 105. (c) 7 E. & B. 278. (d) S. 58. (e) S. 103, 109.

not have authority to receive payment except in money. It is clear, therefore, that his authority is restricted in its nature. The policy here was completely effected, and what was afterwards done was null and void. The contract was complete when the slip was signed. The Respondent thereby undertook the risk. [LORD CRANWORTH:—If the Respondent had agreed to execute a policy, but had not executed it, could there have been an action for not doing so?] There might have been but for the stamp laws; they would prevent the remedy on such a contract, for the slip is not stamped, and so there would not have been sufficient legal evidence of it. [LORD CRANWORTH:—Was there not here a cancellation indorsed on the policy before there was anything which amounted to a delivery of it by the parties to be made liable on it?] That depends on the view which the House may take of the facts of the case, and of their legal effect. The Plaintiffs submit that there was here a complete delivery—that everything was really completed on the 1st of May, there were no terms to be considered, or added, or rejected, the execution of the policy and its delivery were perfect, and there had been nothing since which could impeach the validity of the contract: *Ridgway v. Wharton* (a), where *Fowle v. Freeman* (b) was adopted.

Mr. *Bovill*, Q. C., and Mr. *Archibald*, for the Defendant:—

There was no policy here under the hands and seals of the company at the time of the loss. The declaration alleged the existence of a policy of insurance, purporting thereby to bind the company to certain things. There was nothing to sustain that allegation. Payment of the premiums was to be made by the Plaintiffs through their agent, Lascaridi. The bill to make that payment was drawn in May, it had four months to run, and the date at which it was to become payable was actually subsequent to the date at which the ship was lost, and was long subsequent to the time at which the policy had been repudiated. The Respondent never received any payment—the broker was, indeed, at one time debited to him in the books of the company, but that was nothing without the broker's assent; and so far from giving that assent, he denied all liability to pay the premium, and stated that the policy ought not to have gone forward. That occurred on the 8th of June; and as the underwriter always looks to the broker, the policy then came to an end. A memorandum of cancellation was made on the policy, and though the policy was left with the broker, it was left not as a delivery of it, as a policy, to him, as the broker for the assured, but merely to enable him to get a return of the stamp duty. This, so far from being an acknowledgment of liability, was a distinct declaration that no liability existed. The broker was the avowed

(a) 6 H. L. C. 238.

(b) 9 Ves. 351.

agent of the Plaintiffs, and they were bound by his acts. Nothing farther occurred till the vessel was lost. The Defendant's company was not a corporation, but even if it had been, that would not have made the affixing of the seal to the policy binding on the company, unless that act had been done with a distinct intent to that effect: *The Derby Canal Company v. Wilmot* (a). Nothing was done here which would bring the case within *Doe d. Garmons v. Knight* (b), where there had been a formal affixing of the seal, and a formal delivery of the document as the deed of the party. As to the delivery of a deed, it is said in the *Touchstone* (c):—

“The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed.” Here it was only proposed to be delivered, and on that proposal it was repudiated. In truth, it never was delivered, and has never been in the possession of the Appellants as a deed accepted by them. That acceptance was necessary to make it binding on the insurers, for the Appellants were at liberty, up to the last moment, to object to the terms of the deed and to repudiate it. In *Thompson v. Leach* (d), three out of four Judges were of opinion, against Ventris, that where there had been a surrender, though formally executed by some parties, if not agreed to by the surrenderee it did not operate as to him. Viner (e) is to the same effect; and in *Townson v. Tickell* (f) a devisee in fee was allowed to disclaim by deed without matter of record. Here the policy was never intended to be absolute till accepted by the other party, and by him it was repudiated and rejected.

The writing of the terms on the slip was not all that was necessary to constitute the contract. The premium was to be paid, and the policy was to be accepted. Neither of these things was done. Under such circumstances, the analogy to a bill of exchange is good, and the consideration not being paid, and the instrument not being delivered, no liability can possibly arise upon it. So in the case of an arbitration. The appointment of an arbitrator is not all that is necessary to bind the parties. It cannot, therefore, be argued that the signing and sealing of the policy rendered the policy completely binding on all parties. The acceptance of it would have made it binding—that acceptance was refused. The terms of the proposed contract were not adopted by the Appellants, and they, not having accepted it, cannot now claim the advantage of it.

Sir *G. Honyman*, in reply:—

Payment in account is, in these matters, according to the practice

(a) 9 East, 360. (b) 5 B. & C. 671. (c) Ch. 4, p. 58. (d) 2 Vent. 198. This judgment was affirmed in the King's Bench, 3 Mod. 296, but is said (2 Vent. 208) to have been reversed in the House of Lords. (e) Abr. Faits, K. pl. 12. (f) 3 B. & A. 3i.

in London in such cases, equivalent to actual payment. The broker here did not refuse the policy by the authority of the Plaintiffs, and his refusal without their authority had no effect. It was executed completely as a policy, and being so, delivery and acceptance of it were not necessary to complete its validity.

The following question was put to the Judges :—

“ Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company was, when the ship *Leonidas* was lost, liable as insurer to the Plaintiffs on the policy, or alleged policy, in the pleadings mentioned? It is to be assumed that the ship *Leonidas* was totally lost on the 1st of September, 1861.”

MR. JUSTICE SMITH :—

My Lords,—I answer the question of your Lordship, in the negative, on the ground that there never was, as it seems to me, a complete and available contract of insurance.

I assume it to be clear that the slip does not create a valid contract of insurance, and that it is only of avail as a proposal, or an order for a complete contract or policy of insurance. I apprehend it to be equally clear that the contract is not complete until the policy is executed, and delivered to and accepted by the assured, or some agent for him. This policy, although executed, was not in fact delivered out of the office of the Respondent, either to the assured or to his broker, Lascaridi, who had ordered it, and whilst it lay in the office the intended insurance was, by the broker, put an end to, on the ground that it had been put forward in mistake. I assume, in favor of the Appellants, that if the contract of insurance had been complete, Lascaridi had no authority to rescind the contract; but I assume also, in favor of the Respondent, that, whilst it was incomplete, Lascaridi had authority to intercept its completion.

The whole case, therefore, is reduced to the question, which is mainly one of fact, whether, after the policy was executed, and before it came to the hands of the assured or his broker, the contract was perfected.

The Appellants' case, on this cardinal point, wholly rests on the assumption that Lascaridi had made the officers of the company his agents to accept the delivery of the policy on his behalf. I think this is an assumption which is not warranted by the facts of the case. It arises from the very nature of the transaction that the person intending to insure, or his broker (when he acts through a broker), has a right to see the terms of the policy, and to object to them, if he thinks fit. This right may, of course, be delegated by the person intending to insure, and, I will assume, by his broker also; but it seems to me that clear evidence of such delegation is necessary, and the person intending to insure cannot, I think, with reason, be

presumed to have delegated it to the insurers, from the fact that the policy was left in the office of the company, and not sent for; and yet such a presumption must be made if the argument for the Appellants is to prevail. The right to object to the terms of the instrument, which may obviously be of the utmost importance, would if this presumption is made, be gone as soon as the directors have executed the policy and handed it to their own clerks.

In the result, I think that the assumption on which the Appellants' case rests is not warranted by the evidence; and I confess it seems to me that consequences full of real danger to the interests of persons intending to insure would follow from a rule founded on such an assumption. I agree with my learned brothers, who think that it is better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence.

MR. BARON PIGOTT :—

My Lords,—In answer to your Lordships' question, viz., "Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company was, when the ship *Leonidas* was lost, on the 1st of September, 1861, liable as insurer to the Plaintiffs on the alleged policy in the pleadings mentioned," I answer that, in my opinion, the company was so liable.

The facts are very fully and accurately set forth in the judgment delivered by Mr. Justice Blackburn, in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent ones in stating the grounds of my opinion.

That opinion is based upon two considerations. First, I think there was a perfect and binding contract of insurance between the parties, dated on the 1st of May; and, secondly, that it was never cancelled or made void as between the Appellants and the Respondent.

The whole difference between the parties has obviously arisen from the fraudulent conduct of Lascaridi, the Plaintiffs' broker; but it is equally clear, I think, that they are not to be held responsible for, nor ought their rights to be affected by, it. The authority with which Lascaridi was invested by the Plaintiffs was that of a broker employed to effect an insurance in the ordinary manner, with this additional circumstance only, that after he had bespoken the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. To that alteration the Defendant acceded, and thereupon a second slip was initialed by him for the insurance in question (the former slip being destroyed).

The case states what is the course of proceeding where, as in this case, insurance companies become the insurers. It is, that "a separate slip is prepared by the broker of the assured, and the policy is



afterwards prepared from it by the company, and is *kept by them until sent for* by the assured or his broker." A separate slip was in fact so prepared for this policy, and was left by Lascaridi at the Defendant's office, in order that a policy might be made out in the usual course by the Defendant. Then, with regard to the premiums, it is the custom for insurance companies to give credit to the brokers for them, and to debit them in account. This was done in the books of Defendant on the 1st of May, the day of signing the slip for this policy. On the same day Lascaridi sent to the Plaintiffs (his principals) an account in which he debited them with the premium and duty, and he also drew upon them at the same time for the amount. This draft was accepted by Plaintiffs, and was paid at maturity. When they accepted this bill they were told by Lascaridi that the policy would be ready in a day or two. In a few days afterwards, a policy in the form usually adopted by the Defendant's company was filled up from the last slip, and was duly executed by two directors of the company.

It bears date on the 1st of May; it purports to have been signed, sealed, and delivered in the presence of a witness; it was therefore in form complete. In that state it continued in the custody of the Defendant until the 8th of June, when the Defendant sent a debit note for the premium and stamp to Lascaridi's office. At the instance of Lascaridi the Defendant was induced to cancel the policy, on the representation that it had been "put forward in error." This (as we now know) was a false statement on the part of Lascaridi. It is on the circumstance of the policy remaining in the hands of the Defendant, as above stated, that the question depends, whether the transaction constituted a complete contract, in law and fact, or not. I am of opinion that it was complete.

What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have the reason given; and that reason is, not that it waited anything to be done upon it by the Defendant, or to be assented to by the Plaintiffs, but that it was there only till sent for by the assured or his broker, or, in other words, that it remained there according to the trade usage or by tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But farther, it is plain that the formal assent of the Plaintiffs was not wanting to any of the terms of the policy, for that was evidently intended to be, and accordingly was, made out in the Defendant's usual form, filled up with the particulars from the slip. But farther, the Defendant acted upon the policy as a perfected transaction, when, on the 8th of June, he demanded payment of the premium for which he had given credit to the broker. In the face of this demand, I confess it seems startling that the Defendant can be heard to say

that there was no complete contract subsisting at that period. It was in form complete, and was shown, by the conduct of all the parties to it, to be believed and intended by them all (apart from Lascaridi's fraud) to be also completely in operation.

It seems, therefore, to be reduced to this, viz.: Was it essential that the deed should be given out of the Defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his *Touchstone*, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors (*a*), and by the whole context shows that it is a question of intention. He afterwards (*b*) says, that "Delivery is either actual, *i. e.*, by doing something and saying nothing, or else verbal, *i. e.*, by saying something and doing nothing, or it may be by both: and either of these may make a good delivery and a perfect deed."

*Doe d. Garmons v. Knight* (*c*) is an authority most satisfactory on this subject, and it is only necessary to quote one passage from the judgment of the Court as delivered by Mr. Justice Bayley. He says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to show that the Defendant did intend it to be unqualified, and a deed in full operation.

The only remaining question which could arise, viz., whether the Plaintiffs were bound by the fraudulent conduct of Lascaridi in procuring the cancellation of the policy, was not much urged at your Lordships' bar, although it had been relied upon at *Nisi Prius* and in the Court of Common Pleas. It is a proposition clearly not sustainable. The act was without authority, express or implied; and it is enough to say upon it that Lascaridi was the broker employed to procure a policy, and from that employment it is impossible to imply an authority to cancel it. Then he certainly had no express authority, as is admitted in the special case.

I therefore answer your Lordships' question in favor of the Plaintiffs, and in the affirmative.

MR. JUSTICE MELLOR:—

My Lords, I answer the question put by your Lordships to the

(a) Vol. i. C. 4, p. 54.

(b) *Ibid.* p. 57.

(c) 5 B. & C. 692.

Judges in the affirmative. I carefully attended to the arguments urged by the learned counsel who appeared for the parties in this case at the bar of your Lordships' House, but I confess that the observations then addressed to your Lordships did not affect the conclusion at which I arrived when the case was heard by the Judges in the Court of Exchequer Chamber. I do not venture to repeat the observations which I then made, but I humbly refer your Lordships to the judgment which was then read for me by my brother Blackburn.

My judgment depends upon the facts which I consider to be admitted by the case, viz., that the policy in question was prepared by the Defendant in conformity with the instructions of the Plaintiffs, given through their broker, Lascaridi; that by the mode of dealing between the Plaintiffs' broker and the defendant, the amount of the premium and the stamp must, as against the Defendant, be treated as paid; that the policy was duly executed and delivered as a deed by the Defendant, who did everything that he intended to do to complete such execution and delivery, and that it was merely kept in his custody until called for by the assured or their broker. The Plaintiffs, as I think, were bound by it, because it was prepared in conformity with their instructions. The Defendant was bound by it, because he had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the Plaintiffs, and had done everything which he intended to do by way of execution and delivery of the policy as a deed, and retained it only for safe custody until sent for by the assured in the ordinary course of business.

MR. JUSTICE BLACKBURN:—

I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the Defendant's company to the Plaintiffs; second, whether the transaction between the Defendant's company and Lascaridi (the Plaintiffs' broker) operated so as to release the Defendant from the obligation he had contracted to the Plaintiffs, supposing the policy to have been so executed.

I have already, in the judgment I delivered in the Court below, expressed the reasons for my opinion at length (*a*). And as I have not been induced, by anything I have heard at your Lordships' bar, to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat the opinion I there gave.

I have had an opportunity of perusing the opinions of my brothers Willes and Smith, and, if I understand them rightly, they agree with

(a) 13 C. B. (N.S.) 451.

me in thinking that if the policy was binding before the 8th of June, what occurred subsequently would not discharge the company. I shall, therefore, say nothing more on that branch of the question.

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the Defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, show that the intention of both parties was that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities,

as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case* (a), it is said; "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the Defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the Defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case, the assured could not have refused the deed *in pais*, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it *in pais*.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

MR. JUSTICE WILLES:—

My Lords, I answer the question in the negative, that upon the facts stated in the special case, the Respondent (who represents the Victoria Fire and Marine Insurance Company), was not, when the ship *Leonidas* was lost, liable as insurer to the Plaintiffs on the policy, or alleged policy, in the pleadings mentioned.

Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy, if once completed, so as to be the contract of and binding upon both parties, the question is, whether it ever was so completed?

In dealing with this question as a practical one, it must be borne in mind that albeit consent, not corporal possession, makes the contract, yet the plain duty of the broker is not merely to bespeak, but to pro-

cure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part, viz., as to the insurances effected at Lloyd's, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he, on behalf of his employer, should have the policy.

In the case of insurances at Lloyd's, no difficulty can arise, for the broker sends round the policy and procures the signatures. When the policy is effected with a company, therefore, if analogy is to prevail, the broker ought to call for the policy. A careless practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy, but if this be so, it is pure negligence. Nor can it be doubted that the employer in such a case, equally as in that of insurance at Lloyd's, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising, for want of a policy, or of a proper policy, through his default in not asking for it, or looking to see that it was in order, resist an action such as was brought by the employers in *Turpin v. Bilton* (a).

The statutes requiring contracts of marine insurance to be in writing, and stamped (35 Geo. 3, c. 63, s. 11; 54 Geo. 3, c. 144, ss. 3, 4, 5), annul contracts not so framed, consequently, a marine policy, or contract for a marine policy, to be valid, must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed, there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried, without objection, upon the notion that the insurance is complete from the date of the slip.

But the law, as settled by the decisions upon the construction of the statutes referred to, is, that as there can be no valid insurance, or contract for an insurance, unless by writing with the statutory requisites, the slip by itself has no binding force. Thus, it has been held, that, notwithstanding the slip, the proposed assured, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy: *Warwick v. Slade* (b), where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete: *Parry v. The Great Ship Company* (c).

(a) 5 Man. &amp; G. 455.

(b) 3 Camp. 127.

(c) 4 B. &amp; S. 556.

It follows that the slip, though complete, is no contract, nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into *in futuro*, and, in case of insurance with a company, a request that the policy shall be prepared at the office. Does it follow, that when a policy is prepared in alleged compliance with the request, it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker, when the negotiation takes place through a broker, to object (and especially in the case of company policies, which do not always follow Lloyd's form), that the policy is wrong. In case of war, or a dangerous voyage, or, indeed, any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running-down clause, which has been so commonly added in the margin since *Devaux v. Salvador* (a); and see also *Taylor v. Dewar* (b).

It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and, inasmuch as such rejection or refusal touches the question, policy or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it.

By way of removing this difficulty, various suggestions have been made in argument. One was that the case is analogous to a conveyance of property, where assent is presumed until disclaimer. I am not aware, however, that this doctrine of presumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid, or allowed to debit in account, a premium which may or may not be commensurate to the risk.

In the case of a simple benefit conferred, to be taken as it is, or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognize a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which must be matter of bargain, and must be incomplete so long as either mind may dissent.

Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the Plaintiffs, but rather tend to illustrate the necessity of subsequent assent. Thus, if B. order of a watchmaker a watch of the same make and materials as that of A., with B's name upon it, and the watchmaker makes it accordingly, intend-

(a) 4 Ad. &amp; E. 520.

(b) 5 B. &amp; S. 58.

ing it for B., and puts B's name upon it, so that it is as much as it can be the very watch bargained for, yet, without a new assent on B's part it does not vest in him; the watchmaker cannot make B. take to it, nor B. compel its delivery. See the argument in *Atkinson v. Bell* (a).

And, in like manner, as to a contract to be prepared *in futuro*, if goods are bought, to be paid for by the buyer's promissory note or check, payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or check, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or check in the seller, and the buyer may, without more, retake the note or check from his servant and put it into the fire.

It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which, to be valid, must be in writing, shall be prepared by one of the parties, proposing to contract, for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy, not binding as part of a contract, have that effect.

As another way of getting out of the difficulty, it was suggested to assume that the insurance company, or servants of the company, were made agents of the employers of the broker, for the purpose of assenting to the policy on their part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorized to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties, employed by him in a dependent capacity to attend to his business, involves a contradiction, and has no foundation of fact.

These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly include some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the assured, include, besides the implied warranties, payment of premium, either in cash, or by being credited in account.



If, then, the Plaintiffs had ordered the policy without the intervention of a broker or his obtaining credit for himself, they could not have insisted upon receiving it without paying the company in cash. Had the directors offered them the policy, and had they refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before the Plaintiffs called for the policy and paid the premium, the same result would follow, though the insurers might not choose to take advantage of a short delay. So much for a cash transaction.

If the directors agreed to insure against the Plaintiffs' promissory note at a month, like considerations would arise. Had they in such case prepared the policy, and left it with their clerk, and the Plaintiffs had drawn the note, and left it with their clerk, it is difficult to see why, without more, the policy should vest in the Plaintiffs and not the note in the company, which, without more, it clearly would not.

In the principal case the directors were content to take the broker's credit instead of cash; that is to say, instead of stipulating for cash down they stipulated for the broker's allowing them to charge him in account with the premium; and this the broker, refusing to take to the policy, refused to allow them effectually to do, and so put the directors in the same position as if they had stipulated for cash, and cash had not been paid.

Some confusion has arisen from an attempt to deal with this case as if it had been that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employers, with whom, directly, the Defendant had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the Defendant looking to him for payment, and having no claim against his employers. Inasmuch, then, as the broker has to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one, or the one, ordered. When he does so properly his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the Defendant, who dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it, and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused.

The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the Respondent's office, and whilst he waited

for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay; I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled.

No subsequent protest by the principals that their agent ought to have acted otherwise can avail them. Their payment of the premium was not made to the insurers, but to their own ill-conducted broker, and their remedy must be against him. The Defendant has not received, but has been refused, the premium; and he was in no default, because he acted upon the refusal of the broker, to whom the whole business of effecting the policy was left.

The fallacy of the argument for the Plaintiffs consists in separating the preparation of the policy from the rejection of it by the broker, and thus splitting up into several contracts one of which is alleged to be authorized and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which, by reason of the misconduct of the Plaintiffs' agent, was abortive.

The question is thus answered in the negative.

July 16. THE LORD CHANCELLOR (Lord Chelmsford):

My Lords, the difference of opinion which has prevailed amongst the learned Judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the Judges.

The question is one more of fact than of law; and therefore, in considering it, it will be necessary to refer to the facts contained in the special case:—[His Lordship stated them very fully].

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord Ellenborough in *Jenkins v. Power* (a), and by Mr. Justice Bayley in *Power v. Butcher* (b). The latter learned Judge says (c): "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter."

The questions which arise out of the facts of the case are: 1st.

(a) 6 M. & S. 282.

(b) 10 B. & C. 329.

(c) Ibid. 339.

Whether there was a complete contract of insurance between the parties? and 2nd. If there was a complete contract, whether it was afterwards cancelled by the Plaintiffs' authority?

Upon the first question we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the instrument itself, and upon the facts stated in the special case that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company in the presence of Reginald Scaife, resident secretary. This statement on the face of the policy that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed"—a form which, no doubt, or something equivalent to it, was observed upon this occasion. The policy, most probably, was afterwards given to the secretary, to be kept till called for. Now, although the policy was thus retained by the officers of the company, when formal execution of it had taken place, they held it for the Plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned Judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies, to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the Plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed, in exact conformity to his instructions, his duty was so far discharged; and without the authority of the Plaintiffs he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon.

It is hardly necessary, after the preceding observations, to say anything upon the second question, as to the supposed cancellation of the policy. All the Judges seem to have thought that if the contract was binding, Lascaridi had no authority to cancel it. The company could not have been led from anything in the previous transaction respecting the same vessel, to suppose that Lascaridi was authorized to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip, which is merely the inception of a contract,

and to change the terms of the proposal for an insurance; and an entirely different thing to release the underwriters from their liability upon a policy. It is quite clear that Lascaridi had no authority from the Plaintiffs to relinquish on their behalf the benefit of a contract to which they were entitled, and that the company had no reason to suppose that he possessed any such authority.

I think that the judgment of the Exchequer Chamber was wrong and ought to be reversed, and that judgment should be entered for the Plaintiffs.

LORD CRANWORTH :—

My Lords, my noble and learned friend has gone so fully into the facts of this case, that I shall not farther advert to them, but shall assume that they are present to the minds of your Lordships.

There is one part of this case which seems to me to admit of no doubt. If the policy was so executed as to have become a complete instrument, binding on the Respondent, and giving a good right of action to the assured in the event of a loss, I think it clear that he could not cancel it at the instance of Lascaridi. The insurers had a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

The only semblance of plausibility in support of such an argument was, in this case, the fact that on a previous occasion he had an authority expressly delegated to him by the Plaintiffs to cancel something—but that was an authority, not to cancel a policy, but to cancel a slip. They had originally proposed, through Lascaridi, to effect a policy on the *Leonidas* with the Respondent, on terms materially differing from that ultimately acted on, and a slip had been signed, and handed to the Respondent for that purpose, five days before the signing of the slip on the 30th of April; but on that latter day, and before anything had been done, Lascaridi called on the Respondent, at the instance of the Appellants, expressing their desire to substitute the terms of insurance ultimately acted on, instead of those originally proposed. To this the Respondent agreed, and the slip dated the 30th of April, 1861, was accordingly prepared, and left with the Respondent as the groundwork of the policy to be prepared by the company. It was suggested that as the Appellants had thus authorized Lascaridi to make this important change in the nature of the contract to be entered into, the Respondent might reasonably suppose he had authority to sanction the cancellation of a policy already validly binding on the assurers. To this I cannot accede—as it is admitted that Lascaridi

had not, in fact, any authority to cancel the policy of the 1st of May. If it was a binding instrument, his act cannot affect the Appellants, unless it was done according to some ordinary course of business which would warrant it. I can see nothing whatever to warrant such an assumption. And, indeed, the point was not much insisted on. The point really argued was, that the circumstances are not such as to show that any absolute liability ever attached on the company. The policy, it is said, did not become a binding contract on the company until it had been taken from the office by the Appellants or their broker, and been accepted by them as the terms by which they were to be bound.

There is no direct evidence as to what actually took place when the policy was, according to the practice (as stated in the language of the special case), filled up from the slip by the officers of the company; but as the policy purports to have been signed, sealed, and delivered by two directors of the company in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is, that this was the course prescribed by the deed, and that that course had been duly followed.

But, as to the effect of what was so done, the parties differ. The Appellants contend that by thus signing, sealing, and delivering the policy, the directors made it an instrument thenceforth binding on the company. On the other hand, the Respondent contends, that until the policy was taken away by the assured, or his broker, it did not become binding on the company. This latter view is that which has been taken by the great majority of the learned Judges; and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the Judges who heard the case when it was argued at your Lordships' bar. I am of opinion that from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company; and that it was not necessary, in order to give it binding efficacy, that it should be taken away by the Appellant or his broker.

I come to this conclusion on the following grounds:—In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition

has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow.

If, therefore, the directors who executed this policy, delivered it only conditionally, *i.e.*, to take effect only when taken away by the Appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until it is sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery; of converting delivery as a deed into delivery as an escrow. The practice referred to is, at least, as consistent with the hypothesis of delivery as a deed as of delivery as an escrow. A policy of this company can only be executed (as I presume) when certain of the directors and officers of the company are assembled: and this explains why it is executed in the absence of the party assured. The practice assumes the previous assent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should *send* for it, evidently treating it as an instrument complete before it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties.

I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till sent for by the assured or his broker; not till the assured has had an opportunity of examining it so as to ascertain that it is conformable to the slip.

It can hardly be argued that after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy it is restricted to six months, the assured on receiving the policy and discovering the error might well object, and insist on having a different policy; but yet if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So if a loss should occur while the policy

remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be, because it had been completely executed, though never seen and approved by the assured. And if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured.

On these grounds I have come to the conclusion, after much consideration, that the three learned Judges who were the majority giving their opinions to your Lordships were right; and so, that judgment ought to be for the Appellants.

*Judgment reversed; and judgment given for the Plaintiff.*  
*Lords' Journals, 16th July, 1867.*

## SECTION II.—STATUTE OF FRAUDS.\*

### WELFORD v. BEAZELY.

IN CHANCERY, MAY 23, 1747.

[*Reported in 3 Atkyns, 503.*]

A QUESTION AROSE upon the statute of frauds and perjuries, whether a person *subscribing* a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of that statute.

LORD CHANCELLOR,

The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon.

\* Ch. I, Sect. II, Finch.

The word *party* in the statute is not to be construed party as to a deed, but *person* in general, or else what would become of those decrees where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute.

There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it.

Lord Chancellor denied the general doctrine as laid down in Proc. in Chan. 402, *Bawdes* versus *Amhurst* (a), though true as applied to that case by Lord Cowper, and said the difference betwixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties; but here the defendant signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case\*.

\* The defendant previous to the marriage of her daughter with Welford agreed to give her a marriage portion of 1000*l*. By marriage articles (to which the defendant was not a party), it was agreed that the 1000*l*. should be vested in trustees for certain purposes therein mentioned. The defendant was a *witness* to the articles. Afterwards the defendant took Welford into partnership with her, and the above 1000*l*. was agreed between Welford and herself to be a part of his share of the capital, and she gave him credit for it. It was decreed, that the 1000*l*. should be paid to the trustees upon the trusts declared by the marriage articles. Reg. Lib. B. 1746. fol. 355.

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## FOWLE v. FREEMAN.

IN CHANCERY, MARCH 8, 1804.

[Reported in 9 Vesey, 351.]

THE defendant having advertised a freehold estate for sale, the plaintiff wrote to him; offering £27,500; which produced a letter from the defendant, dated the 1st of March, 1803; stating, that, provided the plaintiff would agree with the tenant as to the terms, upon which he should quit, the defendant would accept the offer, and would close his agreement with the plaintiff, notwithstanding any more advantageous offer in the interim; and that the defendant would come upon the spot with his attorney to draw up the agreement properly any day after that, which the plaintiff would appoint.

The plaintiff and the tenant not coming to terms, a meeting afterwards took place between the plaintiff and defendant, at which, after some negotiation, the defendant wrote and signed a paper as follows:

(a) On a marriage treaty, the intended husband, and the young lady's father, went to a counsellor's chambers to have, in consideration of the portion the father proposed to give, a settlement drawn; minutes of agreement were taken down in writing by the counsel, and given by him to his clerk, to be drawn up in form; the next day the father dies, and the day following the marriage was solemnized: this agreement, notwithstanding these preparations, was held by Lord Cowper to be within the statute of frauds and perjuries. *Bawdes* versus *Amhurst*, Pr. Ch. 402. 2 Ch. Rep. 284.



"March 12th, 1803. I agree to sell to Mr. Fowle, my estate, tithes, and manor at Chute Lodge, together with the woods, trees, and fixtures, (except Cadley Cottage,) for the sum of £27,000, upon the following conditions."

Then followed the conditions in favor of Mr. Cooke, the tenant. This paper was not signed by the plaintiff. It was signed by the defendant: who, in the same paper, subjoined a letter to his solicitor; desiring him to prepare a proper agreement for Mr. Fowle and him to sign, and to deliver to the bearer an abstract of his title deeds.

The defendant afterwards refusing to complete the purchase, and countermanding his direction to the solicitor, the bill was filed; praying a specific performance.

The defendant resisted the performance; first, on the ground that the memorandum and letter were signed by him, not as an agreement for the sale, but merely as instructions for such agreement; the plaintiff not having signed the memorandum, nor done any other act on his part to bind himself. The second ground was, that the memorandum was signed by him under the effect of the misrepresentation of the plaintiff as to Cooke's claims.

Mr. *Romilly*, for the plaintiff, contended upon the Statute of Frauds (a), that, if the agreement was signed by the party to be bound, it would do; according to *Coleman v. Duck* (b).

Mr. *Alexander* and Mr. *Stanley* for the defendant.—Independent of the misrepresentation, there is no agreement in this case. Upon all the circumstances the defendant never meant to be bound alone; nor, till an agreement should be signed by both parties, according to the directions at the bottom of this paper. He never meant this to be delivered as an agreement. It is clear from the letter, he meant to have an agreement binding on both parties, and to have the aid of his solicitor. This is no more an agreement than the paper in *Mathews v. Warner* (c) was a will. *Prima facie* it is not to be taken that a man means to bind himself, leaving the other party at liberty; and circumstances, showing that the paper was only a plan, are strong to show he did not mean to bind himself. He had a right to introduce many stipulations; but according to the plaintiff's argument he could not have added any thing; or made even the slightest variation. If this paper was to be a binding agreement, why did not the plaintiff, who was present, sign it: why did it remain as a mere paper of instructions in the defendant's possession?

Mr. *Romilly* in reply.—This Court will decree a specific performance, though there is no agreement in writing; if there is evidence in writing, containing all the terms of the agreement: in the case even of a mere letter to an agent, saying, he had agreed to sell the estate. If this does

(a) Stat. 29 Ch. 2, c. 3.

(b) 5 Vin. 527.

(c) 4 Ves. 186.

not bind, innumerable decisions, upon letters, by which the parties did not mean to be bound, as agreements, must be set aside.

**The MASTER OF THE ROLLS.**

The objections made by the defendant are, 1st, that there is no agreement binding the parties : 2dly, that, supposing there is a binding agreement, the defendant is not to perform it ; because a term was omitted, which he would have inserted but for the misrepresentation of the plaintiff. As to the first objection, it is clear that early in the negotiation they had agreed upon all but the terms to which the tenant was to be entitled from the purchaser. The price was agreed upon. A meeting took place in order to settle those terms ; the only thing remaining : that is, for the purpose of settling the agreement. At that meeting the terms are settled ; and, if there is no objection upon the Statute of Frauds, what passed would have amounted to an agreement. Then the terms are reduced to writing. The whole was copied out fairly by the defendant, and he signs it. There is no doubt, it was a complete agreement so far. The question is, whether the whole effect of it is suspended by adding to it a letter to his attorney ; desiring him to prepare a more formal instrument. It is impossible that letter could have such an effect. If it had, though that formal agreement had been prepared, he would not have been obliged to sign it. He might have sold the estate the next day for a higher price. At least it amounts to this ; that, if prepared, he should execute that more formal agreement. The attorney could not introduce the least variation by his direction. He had bound himself so far, that these should be the terms introduced ; just like a letter, intended to be carried into execution by a more formal agreement ; but he repents ; he is bound by his letter, by his proposal. There have been decrees, founded merely upon letters, proposals, never intended at the time to be a complete, final, agreement. It might as well be contended, that, if there was a reference to deeds, to be formally executed, there is no agreement ; but that is to be by the deed.

Upon the other point the Master of the Rolls declared his opinion upon the evidence, that the charge of misrepresentation was not made out.

The cause ended in a reference to the Master, to see whether a good title could be made.

## LAYTHOARP v. BRYANT.

IN THE COMMON PLEAS, APRIL 30, 1836.

[Reported in 2 Bingham, New Cases, 735.]

THIS was an action against the Defendant to recover damages for loss occasioned to the Plaintiff by the Defendant's refusing to pay for certain leasehold premises he had purchased at an auction, on the 3d of December 1833, for 441*l*.

The particulars and conditions of sale announced, that the lease and goodwill of the premises, situate in Stoke Newington, in which the coke, coal, and seed trades had been carried on, would be peremptorily sold by auction by Mr. Thomas Ross, at the Auction Mart, on the 3d of December, by order of Mr. W. Laythoarp, the proprietor, retiring from the trade.

The Defendant signed a memorandum of the purchase at the back of a paper containing the particulars and conditions of sale, but, being known to the auctioneer, was not required to pay any deposit. On the 12th of December the Plaintiff's solicitor sent Defendant an abstract of the Plaintiff's title, and by letter called on him to proceed with the purchase, when the Defendant, saying he had only bid at the Plaintiff's request, refused to complete the purchase, and returned the abstract. An assignment of the lease, prepared by the solicitor of the ground landlord, accompanied with a letter from the Plaintiff's solicitor, was then sent to the Defendant: this he also returned, still refusing to complete the contract, but making no objection to the title. The Plaintiff thereupon sold the premises again, for 194*l*. 5*s*. and brought this action to recover the difference between that sum and 441*l*., the price which the Defendant had agreed to pay.

A verdict having been found for the Plaintiff,

*Atcherley*, Serjt., pursuant to leave reserved at the trial, moved to set aside the verdict, and enter a nonsuit instead, on the ground that the Plaintiff's name was not in the contract, which appeared to be made with Ross the auctioneer: that it was not binding on the Plaintiff; that therefore, for want of mutuality, the contract was inoperative; and also as not being signed pursuant to the fourth section of the Statute of Frauds. He relied on *Lawrenson v. Butler* (a), where Lord Redesdale refused to enforce a specific performance, on the ground that without a signature to bind the vendor there was no mutuality in the contract; and said, "I confess I have no conception that a Court of Equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance according to the advantages which it might be supposed that they were to derive

(a) 1 Sch. &amp; Lefr. 13.

from it; because otherwise it would follow that the Court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance. This is not equity as it seems to me. If, indeed, there was a concealment, or an ignorance of the facts on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement executed *cy près*; that is, a new agreement is to be made between the parties."

In *O'Rourke v. Perceval* (a), Lord Manners approved of that decision; and in *Martin v. Mitchell* (b), Sir W. Grant says, "When one party having entered into a contract that has not been signed by the other party afterwards repents, and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus penitentiæ*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual; and how can it be complete as to the one and not as to the other?"

A rule nisi having been granted,

*Bompas*, Serjt. and *Steere* showed cause. It sufficiently appears from the particulars of sale, that Ross was acting as agent to the Plaintiff, and that the Plaintiff was a party to the contract. The contract is complete when the auctioneer's hammer falls; *Payne v. Cave* (c). And a court of equity will enforce specific performance, where there is an express undertaking on the part of the purchaser: *Palmer v. Scott* (d). Under the fourth section of the Statute of Frauds, all that is requisite is, that the agreement should be in writing, and signed by the party to be charged. It is true that to constitute an agreement, the consideration must appear; *Wain v. Warlters* (e); but an objection on the ground of want of mutuality has never been made before. Agreements similar to the present have been repeatedly enforced in courts of equity, even under the 17th section of the Statute of Frauds, which enacts that no contract for the sale of merchandise shall be *good*, unless upon a part delivery, a payment of earnest, or a note in writing of the bargain "made and signed by the *parties* to be charged by such contract, or *their* agents: whereas the 4th section only enacts that *no action shall be brought* upon any sale of lands, unless the agreement on which such action shall be brought, or some note thereof shall be in writing, and signed by the *party* to be charged therewith, or some person thereunto by *him* lawfully authorized. In *Buckhouse v. Crosby* (f), the Lord Chancellor

(a) 2 Ball & Beatty, 58.

(d) 1 Russ. & Mylne, 391.

(b) 2 Jac. & Walk. 428.

(e) 5 East, 10.

(c) 3 T. R. 148.

(f) 2 Equ. Cas. Abr. 33.

said, "he had often known the objection taken, that a mutual contract in writing ought to appear on both sides; but that that objection had as often been overruled." In *Seton v. Slade* (a), Lord Eldon said, "This agreement is signed by the defendant only; but that makes him within the statute a party to be charged." In *Coles v. Trecothick* (b), it is said to have been laid down by Lord Hardwicke, "that it is not necessary the identical agreement should be signed; but any note or memorandum will do." *Tawney v. Crowther* (c), and *Hatton v. Grey* (d), establish the same principle. *Lawrenson v. Butler* goes only to the point of specific performance, not to the validity of the contract, and it is the first case in which any doubt has been raised. But in *Lord Ormond v. Anderson* (e) Lord Manners says, "an objection has been made to the execution of this agreement, on the ground that it has not been signed by the plaintiff, and that the defendant could not have enforced it against the plaintiff. I am very well aware that a doubt has been entertained by a judge in this Court of very high authority, whether courts of equity would specifically execute an agreement where one party only was bound. There exists no provision in the Statute of Frauds to prevent the execution of such an agreement; and Sir James Mansfield, who certainly had great experience in courts of equity, lays it down in the case of *Allen v. Bennett*, that a contract signed by one party would be enforced in equity against that party, and that such was the daily practice of that Court." And the same view was taken by Sir W. Grant, who says in *Western v. Russell*, (f) "after the cases that have been determined, I should hardly be at liberty, notwithstanding the considerable doubt thrown upon that point by Lord Redesdale, to refuse a specific performance upon the ground that there was no agreement signed by the party seeking a performance." In courts of law the name of the purchaser, written by the auctioneer acting as his agent, has always been held sufficient to bind him: *Emmerson v. Heelis* (g); and here, the Plaintiff's name was in the conditions of sale. In *Allen v. Bennett* (h) it was held that an order for goods, written and signed by the seller in a book of the buyers, but not naming the buyers, might be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the Statute of Frauds. And Sir J. Mansfield C. J. said, "It was then objected, that one party who has not signed, is not bound; but the fact was the same in the cases of *Egerton v. Matthews*, and *Champion v. Plummer*, and the objection was never taken in either of those cases; but the whole of this case supposes that the

(a) 7 Ves. 275. (b) 9 Ves. 250. (c) 3 Br. Ch. Cas. 161—318. (d) 2 Br. Ch. Cas. 164. (e) 2 Ball & Beatty, 370. (f) 2 Ves. & Beames, 192. (g) 2 Taunt. 38. (h) 3 Taunt. 169.

plaintiff had agreed. Suppose he has not contracted by writing, he has by parol, and he is bound in honor; and it has never yet been decided that an obligation in honor would not be a good consideration. All these cases, *Egerton v. Matthews*, *Saunderson v. Jackson* and *Champion v. Plummer*, suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only; and yet a court of equity can no more dispense with the Statute of Frauds than a court of law can: there is no reason therefore to set aside the verdict, and the rule must be discharged."

In the present case, the letters of the Plaintiff's attorney upon sending the abstract and the assignment may, according to the foregoing decision, be connected with the Defendant's signing the particulars of sale, and constitute an agreement binding on the Plaintiff, even according to the view taken by the Defendant's counsel.

*Atcherley* and *Busby*, in support of the rule.

In order to bind a purchaser of real estate, there must, under the 4th section of the Statute of Frauds, be a mutuality in the contract, as well as a consideration expressed in writing. Without those ingredients, there can be no *agreement*; and though the 17th section of the statute requires only a note of the *bargain* upon a sale of chattels, the 4th section, on a sale of real property, requires a note of the *agreement*. Here, upon the face of the particulars, the property appears to be sold by Ross the auctioneer, not by the Plaintiff, and the Plaintiff, having omitted to sign, there is no *agreement* between him and the Defendant. There is nothing to fix the Plaintiff; nothing on which the Defendant could have sued him for a breach of contract. The letters of the Plaintiff's attorney accompanying the abstract and the assignment of the lease, are mere offers, and not an engagement to sell. The authorities relied on for the Plaintiff are either cases in equity where the question has turned on specific performance, or questions on the 17th section of the statute. Now, upon a demand for specific performance, if the Plaintiff alleges a contract in his bill, the Defendant, unless he puts himself upon the statute in his answer, admits the existence of the contract: *Roberts on Frauds*, p. 106; *Whitchurch v. Bevis* (a). But even in equity it is required that the writing the Plaintiff seeks to enforce should import the privity and assent of both parties: *Charwood v. Duke of Bedford* (b). And in *Champion v. Plummer* (c), Sir James Mansfield said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs; there cannot be a

(a) 2 Br. Ch. Cas. 564.

(b) 1 Atk. 497.

(c) 1 N. R. 254.

contract without two parties, and it is customary in the course of business to state the name of the purchaser, as well as of the seller, in every bill of parcels. This does not appear to me to amount to any memorandum in writing of a bargain." *Gosbell v. Archer* (a) shows that the courts are not disposed to construe the statute away. Even, independently of the statute, no agreement can be enforced without an actionable mutuality between the parties. In *Lees v. Whitcomb* (b) it was held that a written agreement "to remain with A. B. two years for the purpose of learning a trade," was not binding for want of an engagement in the same instrument by A. B. to teach.

TINDAL, C. J. This case comes before the Court on two objections.

First, that when the contract is inspected it does not contain the name of one of the parties. I admit that an agreement is not perfect unless in the body of it or by necessary inference it contain the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise. Looking at this contract, as it may be collected from the particulars of sale, it appears to be an agreement by which Ross sells property on behalf of Laythoarp. When, in the outset, it says that the property will be sold, subject to conditions, we are referred to the conditions in the same paper; and there we see that Ross is an auctioneer who sells for Laythoarp. That gets rid of the objection therefore, that Laythoarp's name is not contained in the contract.

The second objection is of great importance: that the contract has not been signed by the vendor. In order to determine the validity of the objection we must look to section 4 of the Statute of Frauds. That section directs that "no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And the object of the statute was, that no action should lie unless where it could be proved at the trial that the *agreement* had been signed by the party to be charged. First, no action against any executor or administrator; that is, where an executor is defendant; then, "or to charge the defendant upon any special promise, &c.,"—there, the term

(a) 4 Nev. & Man. 485.

(b) 5 Bingh. 34.

is, expressly, *defendant*,—"unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party—" By what party? By "the party to be charged therewith,"—the defendant in the action.

But then it is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's. The preamble runs, "For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." And the whole object of the legislature is answered when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the *consideration* of an agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. *Wain v. Warlters* was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth. But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement, in truth, is made before any signature.

Let us apply this to several of the cases pointed out in the fourth section. I agree that the same principle must be applied to all; but let us see whether in any it has been dreamed of that there must be a signature by both parties. In the first place, take the case of a letter from an executor. Who ever heard that in order to charge him there must also be a letter from the party addressed? If the executor's letter contain merely an offer, that offer indeed must be accepted before it can be binding; but if it contain a promise on adequate consideration, no further signature is wanting to its validity. Let us look at the next case,—an engagement to pay the debt of a third person. Is it not every day's practice to put in a guaranty signed by the surety? but I never heard it objected that unless you show also the signature of the other party the guaranty is void. No such objection was made in *Wain v. Warlters*, although it would have afforded an easy answer to the Plaintiff's claim.

The word agreement, therefore, is satisfied, if the writing states the subject-matter of the contract; the consideration; and is signed by the party to be charged.

Among the several authorities cited, I will only refer to two, which seem to decide this cause. In *Emmerson v. Heelis* there was a sale by auction of some growing turnips. Upon a bidding by the defendant's servant, on the part of the defendant, the lot was knocked down to him; the auctioneer wrote the defendant's name opposite the de-



scription of the lot in the particulars of sale; and the contract was held valid notwithstanding there was no signature on the part of the vendor. *Allen v. Bennett* was a decision on the seventeenth section, but it was held that there was no occasion for a signature by the vendor, although the word in that section is *parties*; in section 4, *party*. *Lees v. Whitcomb* does not bear out the point for which it has been cited. For, first, it turned on the want of consideration; and, secondly, on a variance between the record and the evidence. As to the decisions in courts of equity, I can only say that in the greater number of them there has not been a signature by both parties, and notwithstanding the *dicta* of Lord Redesdale and Sir T. Plummer,—no doubt great authorities,—courts of equity have continued the same stream of decision as before.

PARK, J. I put out of view the decisions in courts of equity, although the greater proportion of them is in favor of the construction we now adopt, and those courts have not followed the *dicta* of Lord Redesdale and Sir Thomas Plummer. And the cases on the seventeenth section of the statute might very much be put out of question, because the language of that section is different from the language of the fourth. But even in those cases, where the language of the section is *parties*, not *party*, it was not held necessary that the contract should be signed by both. In *Saunderson v. Jackson* (a) the name of the buyer was not at first inserted in the contract; but a letter was found referring to it, and it was held the two papers might be connected together. And *Bowen v. Morris* (b) confirms that decision. Then, with respect to the construction of the fourth section, it is best not to make fanciful distinctions, but to look at the words of the statute: "No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This *is* signed by the party to be charged; the consideration is duly stated, and the name of the auctioneer and of the vendor appears in the conditions. In *Lees v. Whitcomb* the only question was, whether the contract was truly set out in the declaration.

VAUGHAN, J. All the essential requisites of sect. 4, both according to the letter and spirit of the act, have been complied with. The argument has proceeded on a fallacy arising out of a misconception of the case of *Wain v. Warlters*. That decision never turned on the ground that the mutuality of a contract must appear, but only that the note or a memorandum must show the consideration as well as the promise, otherwise all the inconveniences would prevail which the statute was meant to obviate.

(a) 2 B. & P. 238.

(b) 2 Taunt. 374.

The present objection has not been taken before, and is not sanctioned by any of the great authorities. In *Seton v. Slade* (a) a signature by one party was held sufficient; and *Fowle v. Freeman* (b) is a decision to the same effect. In *Bowen v. Morris* (c) Sir J. Mansfield said, "In equity, a contract signed by one party would be enforced, and it was not clear that it was different in law."

The courts of equity, with the exception of the *dicta* of Lord Redesdale and Sir T. Plummer, present one uniform stream of authority. There is nothing contrary at law; and looking at the words of the statute, they are, "No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Is not this an agreement which fulfils the requisites of the statute, inasmuch as it states the consideration for the contract, and the promise, and is signed by the party to be charged?

BOSANQUET, J. My opinion is founded on the words of the fourth section of the statute, as well taken by themselves as contrasting them with sect. 17. It is said there has been some difference of opinion on the subject in courts of equity; although the preponderance of authority is in favor of the construction we now adopt; I find no doubt in courts of law; but if there be any, we must revert to the language of the statute: "No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This fourth section does not avoid contracts not signed in the manner prescribed; it only precludes any right of action. The seventeenth section is stronger, and avoids contracts not made as the section prescribes: (d) yet even under that section it has been held sufficient if a contract be signed by the party to be charged. In the fourth section, the language is, expressly, *the party to be charged*. It is said there must be an agreement, and, to be binding, it must be signed. No doubt that is so; and the question is, is this an agreement? It states the particulars of the property to be sold; it incorporates the name of the purchaser, the seller, the property and the price; it includes all the requisites of an agreement, and the Defendant testifies by his signature that such an agreement exists. The question is, can the vendor enforce it, if it be not signed by himself?

The statute requires that it shall be signed by the party to be charged; and it was not intended to impose on the vendor the burden of the proof of some other paper in the hands of the opposite

(a) 7 Ves. 275.

(b) 9 Ves. 351.

(c) 2 Taunt. 387.

(d) See contra per Lord Blackburn in *Maddison v. Alderson*, 8 App. Cas. 438.

party, and which the vendor may have no means of producing; for it often happens that each party delivers to the other the part signed by himself. A common case is, where an agreement arises out of a correspondence; it often happens that a party is unable to give evidence of his own letter; and he is not to be defeated because he cannot produce a formal agreement signed by both the parties to the contract.

My opinion being formed on the language of the statute, it is unnecessary to observe on the letters written on the part of the Plaintiff; but if there had been any doubt as to the extent of what the statute requires, I should have thought those letters would have supplied the deficiency (a).

*Rule discharged.*

## REUSS AND ANOTHER v. PICKSLEY AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JUNE 19, 1866.

[*Reported in Law Reports, 1 Ex., 342.*]

APPEAL by the defendants against a judgment of the Court of Exchequer discharging a rule to enter a nonsuit or for a new trial on the ground of misdirection and that the damages were excessive (b).

The cause was tried at the Manchester winter assizes before Pigott, B., when the following facts were proved:—At the time of the alleged agreement the plaintiffs carried on business at Manchester, and the defendants carried on business as agricultural implement makers, at Leigh near Manchester, under the style of Picksley, Sims, and Co. In the autumn of 1864 an industrial exhibition was fixed to be held at Moscow, and the defendants were desirous of exhibiting some of their machines there. Accordingly they entered into negotiations with the plaintiffs, with the view of the plaintiffs undertaking to look after the goods sent by the defendants whilst at the exhibition. The plaintiffs at first declined the responsibility, but upon the defendants proposing to make an agency for ten years with them if they would bear a part of the expense of the exhibition, one of the plaintiffs, Mr. Ernst Reuss, stated that he would go to Moscow and himself superintend the arrangements necessary for exhibiting the defendants' goods. With that intention he went to Moscow in July, 1864, and remained there for a month. Meantime a quantity of goods were sent by the defendants to the plaintiffs for the purpose of being forwarded to the exhibition. On Mr. Reuss's return he requested an interview with Mr. Sims, one of the defendants, with reference to the Russian agency. An interview thereupon was had at which the terms of the agency

(a) See *Knight v. Crockford*, 1 Esp. 190. (b) The pleadings are omitted. Ed.

were discussed, and afterwards the plaintiffs wrote to the defendants the following letter :

“Manchester, 8th September, 1864.

Messrs. Picksley, Sims, & Co., Leigh.

Referring to our conversation with Mr. Sims, respecting the machinery for the Moscow exhibition, it was arranged that we take charge of all the machines &c., in Hull, and pay for your account all freight charges, insurances &c., till delivered in Moscow. That we sell in Moscow as many of the machines as possible, and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home as you think fit at your expense. That we pay you here cash for all machines sold during the exhibition, the price to be calculated at list price less the full trade discount for cash, that you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10s. per day, and his hotel bill. That the agency for Russia be for ten years from date on following conditions. You to allow us full discount for cash on all orders received by us direct, and that you hand over to us to be dealt with in the same way all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia, excepting Odessa, that may come through any other agent in Great Britain, you allow us a commission of 5% per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia. Awaiting your reply we are &c.,

Ernst Reuss & Co.”

To that letter the defendants replied as follows :

“Bedford Foundry, Leigh, Lancashire,  
September 9th, 1864.

Our Mr. Sims desires me to acknowledge the receipt of your favor dated the 8th inst., and to say as far as the agency for Russia goes he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia. With respect to Italy, Mr. Sims cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly.—I am, &c.

p. p. Picksley, Sims, & Co. Joseph Smith.

Messrs. Ernst Reuss & Co.”

The plaintiffs sent no reply to this letter, but after the date of it goods were sent to them by the defendants, and were forwarded by the plaintiffs to Moscow, where they were shown at the exhibition, which took place on the 7th September, 1864. At the close of the exhibition a great proportion of the goods remained unsold, and in re-

spect of these, as well as in respect of those sold, the plaintiffs incurred considerable expenses.

On the 8th December, 1864, the defendants transferred their business to a Joint Stock Company, and in the February following, the plaintiffs' Moscow agent died. Shortly afterwards the plaintiffs and defendants entered into a correspondence with a view to a settlement of the matters connected with the Moscow exhibition, but the parties were unable to come to any agreement. The plaintiffs thereupon brought this action. No orders for machinery from England had been received by either plaintiffs or defendants for Russia (except Odessa), at the time of the alleged breach.

Upon the trial the learned judge directed the jury that the Moscow and Russian stipulations in the letters of the 8th and 9th September were parts of one and the same contract, and the jury found that the plaintiffs did accept and accede to the terms of that contract. A verdict was accordingly entered under the direction of the learned judge for the plaintiffs, damages 850*l*. Leave was reserved to the defendants to move to set aside the verdict and enter a nonsuit on the ground that there was no sufficient memorandum in writing of the contract under the Statute of Frauds (29 Car. 2, c. 3), s. 4, which enacts, amongst other things, that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or his agent. A rule nisi was obtained in Hilary Term last pursuant to leave reserved, and also for a new trial, on the ground of misdirection by the judge in ruling that the Moscow and Russian stipulations were one contract, and of the damages being excessive. The Court (Feb. 8) discharged this rule (the plaintiffs consenting to reduce the damages to 650*l*.), holding themselves bound by the authority of *Smith v. Neale* (a). Pollock, C. B., however, stated that had the question been *res integra* he should have been disposed to come to a contrary conclusion. Against this decision the defendants appealed, and the question for the opinion of the Court was, whether the defendants were entitled to have the verdict found for the plaintiffs set aside, and a nonsuit entered.

*Brett, Q. C.* (*Hayman* with him), for the defendants. There is no evidence of an assent by the plaintiffs sufficient to bind the defendants to the terms of the contract or contracts contained in the letters of the 8th and 9th September. In *Warner v. Willington* (b), *Kindersley, V. C.*, says that for "an act to constitute a sufficient acceptance of a written proposal, it must be an unambiguous act; and an acceptance of a written proposal must be an unconditional acceptance." Now, the

(a) 2 C. B. (N.S.) 67; 26 L. J. (C. P.) 143.

(b) 3 Drew, at p. 533.

present case may be regarded in two ways ; either the letter of the 9th may be regarded as an assent, with certain modifications, to the terms contained in the letter of the 8th, so as to constitute an entire contract, or else the two letters may be taken to constitute a proposal to which the plaintiffs assented by conduct without writing. As to the first alternative, the letter of the 9th was not an assent but a counter-proposal. The letter of the 8th in reality contained the terms of three separate contracts, as to the Russian agency, as to the Moscow exhibition, and as to the Italian agency. Then the reply is silent as to the Moscow exhibition, modifies the terms suggested as to the Russian agency, and declines the Italian agency altogether. The acceptance, thereof, as far as this reply goes, was neither unequivocal nor unconditional. As to the second alternative, if the contracts ought to be considered as three and not one, the plaintiff's conduct does not amount to an assent as far as the Russian agency is concerned. But granting that the two letters do contain a memorandum of a proposal signed by the party sought to be charged, that cannot be accepted by parol. *Warner v. Willington (a)*, is an authority to the contrary, but with that exception there has been no case on the subject. Kindersley, V.C. (p. 532), says, "I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient."

[BLACKBURN, J., referred to *Colegrave v. Upcot (b)*, cited in Sugden, Vendors and Purchasers, 10th ed. vol. i. p. 164, as decisive of the point.]

The Vice-Chancellor could not have considered that case in point, for it was cited in the argument before him. *Smith v. Neale (c)*, on which the Court below acted, merely follows *Warner v. Willington (a)*. It is moreover not an express decision on this question though Willes, J., expresses an opinion in conformity with that of Kindersley, V.C. The *Liverpool Borough Bank v. Eccles (d)*, also followed the same case.

[WILLES, J., referred to *Mozley v. Tinkler (e)*, where Parke, B., indicates that a proposal in writing need not be accepted by writing.]

The principle of the sufficiency of a parol acceptance ought to be confined to a case where the writing assented to is in itself a memorandum of an agreement and not a mere offer. If it is the latter a subsequent acceptance without writing cannot be enough ; it cannot turn a proposal into an agreement or memorandum sufficient to satisfy the Statute of Frauds. Kindersley, V.C. in the case already referred to recognizes but does not act upon the distinction between a memorandum of agreement and of offer. "The one," he says (*f*), "supposes that the two parties have verbally made an actual contract with each

(a) 3 Drew. 523. (b) 5 Vin. Abr. 527. (c) 2 C. B. (N.S.) 67; 26 L. J. (C. P.) 143.  
 (d) 4 H. & N. 139. (e) 1 C. M. & R. 692. (f) 3 Drew. at p. 531.

other, and when the terms of such contract are reduced to writing and signed that is sufficient to bind the party signing, but if the memorandum is of an offer only, that assumes there has been no actual contract between the parties." This distinction is also recognized in the decisions on the Stamp Acts. A proposal accepted by parol requires no stamp, *i.e.*, it is not considered a memorandum of agreement.

*Manisty*, Q. C. (*Holker* and *Baylis* with him), for the plaintiffs. That the contract contained in the letters was one and not threefold is sufficiently shown from the negotiations which preceded it. As to the letters themselves they constitute an entire proposal, and the defendants must be taken to have approved of and adopted the terms from which they do not dissent. Then assuming the contract to be one, the authorities and dicta, from *Colegrave v. Upcot* (a) downwards, are all in favor of the proposition, that a written proposal signed by one party may be assented to without writing by the other.

*Brett*, Q. C., in reply.

The judgment of the Court (Willes, Byles, Blackburn, Mellor, Shee, and Montague Smith, JJ.) was delivered by

WILLES, J., who after referring to the pleadings, proceeded as follows:—We are all of opinion that the judgment of the Court of Exchequer should be affirmed. It appears that the plaintiffs, through a member of their firm, had some negotiations with the defendants, through a member of their firm, with reference to so much of the contract declared upon as related to the Moscow exhibition. In the course of these negotiations, the plaintiffs refused to encounter the expenses of this exhibition unless the defendants would undertake in some way or other to reimburse them, and accordingly communications as to the manner in which this object could be effected were entered into between the parties. It was suggested by the plaintiffs that they should be employed for a term of ten years as agents in Russia for the sale of machinery. But when first broached, that negotiation did not come to a head. One of the plaintiffs went abroad, and on his return sent word that he wished to see one of the defendants, Mr. Sims, on business, that business being with reference to the agency in Russia. An interview was thereupon had, at which the terms of the agency were discussed, and letters afterwards passed relating to the Moscow exhibition, the agency in Russia, and an agency which the plaintiffs desired in Italy. On the 8th September, 1864, one letter was written by the plaintiffs, and on the 9th an answer was sent by the defendants. The letter of the plaintiffs was to this effect. [The learned judge read so much of the letter as refers to the Moscow exhibition.] Then the letter proceeds to speak of the Russian agency in terms not applicable to a distinct or separate contract. Having dealt with the matters

connected with the Moscow exhibition, which was to operate as accessory to the general agency, and as an advertisement, the letter goes on to detail the terms of the agency for Russia; and as to this part of the arrangement the plaintiffs do not state that they are to abstain from taking orders from other persons. To this, and to this alone, the defendants objected in the letter of the 9th. Then follows, in the letter of the 8th, the paragraph respecting the Italian agency.

In answer to this letter comes the letter of the 9th September. [The learned judge read the letter.] So far, therefore, as the Russian agency goes, the letter of the 8th was otherwise satisfactory to the defendants. Now, the letter of the 8th dealt with the Russian agency and also with the arrangement respecting the Moscow exhibition. There was no reference to the one as distinct from the other, and the conclusion is, that as to the Moscow exhibition no observation was required, and as to the Russian agency the sole objection was that the plaintiffs, instead of having the agency given to them without limitation, were to be prevented from being agents for any one else. As to the Italian agency, that is put out of the question. The meaning, therefore, of the whole is this :—"True we made a certain arrangement yesterday as to Russia, but we meant it to be with a limitation, and as to Italy we made no arrangement at all."

Now, this was either a memorandum of agreement, or at least a proposal with the terms of the letter of the 8th as a basis; a proposal, that is, that the plaintiffs should act as agents at Moscow, and become agents for Russia, pledging themselves to take no other agency. Therefore, I say these letters constitute either an agreement or at least a proposal. Assume it in favor of the defendants to be the latter.

We must now consider what followed. The Moscow exhibition took place, and the goods intended for exhibition were forwarded and dealt with by the plaintiffs as they undertook to deal with them. Expenses were incurred by the plaintiffs which they certainly would not have incurred without a promise of the Russian agency; and these expenses were incurred with reference to the Moscow exhibition. Was this evidence of assent on the part of the plaintiffs to the terms of the letter of the 9th September? The defendants maintain that it was not, and their argument depends on a dissection of the terms of the letter of the 8th. But we see no reason for dissevering those terms. The whole appears to have been one arrangement. When taking the two letters together we find the second silent as to the Moscow exhibition, and when we find moreover that the exhibition was accessory to and connected by way of advertisement with the rest of the Russian agency we conclude that the whole transaction, between the parties was one and indivisible. Therefore there was a performance of their part by the plaintiffs, which was evidence of an assent to the terms of the letters



of the 8th and 9th September, or treating the letter of the 9th as a modified proposal, there was evidence that the plaintiffs assented to it.

Now in point of law what was the effect of this assent? Putting for the moment the Statute of Frauds out of the question, no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, was it or was it not one transaction, and was an assent contained in it; and in this case we are of opinion that the transaction was one, and did contain an assent. But the Statute of Frauds introduces a new element, because it makes it necessary by section 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute.

Many cases might be put in illustration of this proposition, but one or two will be sufficient. Take for example a case arising under the Joint Stock Companies Act (19 & 20 Vict. c. 47), whereby it is provided that no person shall be deemed to have accepted any share in the company unless he testifies his acceptance by writing under his hand [Schedule Table B]. It was at first supposed that something must be done by the shareholder in writing after allotment, and that otherwise he would not be a shareholder because he proposed in writing to become one and to accept his shares upon allotment. But the Court of Common Pleas, when the case was brought before them, said that it was a mistake to suppose that under these circumstances there was no acceptance in writing. The true mode, they say, of regarding such a transaction was that it was from beginning to end one transaction, and accordingly they held that the acceptance was complete, and the statute satisfied by a proposal in writing to accept the shares, followed by an allotment. The Court there acted on a judgment delivered in the Court of Queen's Bench by my Brother Blackburn to the effect that the "acceptance" of goods to satisfy the Statute of Frauds, s. 17, may be prior to the actual delivery of them (*a*). It is indeed quite a fallacy to suppose that because certain acts happen at

(*a*) The cases referred to are *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. (Q.B.), 261; and *The Bog Lead Mining Company v. Montague*, 10 C.B. (N.S.) 481; 30 L. J. (C.P.) 380.

different periods they cannot be so connected as to form one transaction. That was the ground of the Lord Keeper's decision in *Coleman v. Upcot* (a); where he held that an offer to sell an estate made in writing and afterwards accepted by parol bound as a contract. The principle of that case was recognized and assented to by Kindersley, V. C. in *Warner v. Willington* (b); he did not, however, treat it as precisely in point, probably on account of the note in Viner, stating that, in fact, there was an acceptance in writing. The judgment, however, was founded on the consideration that the parol acceptance was sufficient, and it is cited to support that position by Lord St. Leonards (Sugden, Vendors and Purchasers, 10th ed. vol. i. p. 164). The case of *Warner v. Willington* (b) was followed by the Court of Common Pleas in *Smith v. Neale* (c), and by the Court of Exchequer in *Liverpool Borough Bank v. Eccles* (d).

So far as to agreements which must be mutual, but where the statute only requires the signature of the party to be charged. But we may usefully consider two classes of contracts. One class includes cases where a proposal is made which may or may not be acted on. The most ordinary example is a guarantee, which by section 4 of the statute must be in writing. The creditor may supply goods to the person whose credit is guaranteed or not as he pleases; but if he does supply them the surety is bound, except in cases like *Mozley v. Tinkler* (e) where on the true construction of the guarantee, which was in the form of a letter to the plaintiffs, it was held that notice of the plaintiff's acceptance of it should have been given. But in that case it does not seem to have occurred to any of the Court that the acceptance need be in writing. Indeed the judgment of Lord Wensleydale (Parke, B.) rather points to the opposite conclusion. That case therefore is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms along with the signature of the party to be charged.

It has been urged upon us that this conclusion will lead to fraud and perjury, and to the very mischiefs the statute was passed to prevent. We do not concur in that view, because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to show that a regular agreement or memorandum of it, signed by one party only, ought not to bind him. The reason we have given is a good answer to the argument, but that argument was also considered by the Court of Common Pleas in *Laythoarp v. Bryant* (f), where the Court held in spite of a weighty dictum

(a) 5 Vin. Abr. 527.  
(d) 4 H. & N. 139.

(b) 3 Drew. 523.  
(e) 1 C. M. & R. 692.

(c) 2 C. B. (N.S.) 67; 26 L. J. (C. P.) 143.  
(f) 2 Bing. N. C. 735.

of Sir W. Grant in *Martin v. Mitchell* (a), that only the party to be charged need sign, the other party, however, at the same time being ready to fulfil his own part of the agreement before suing.

Again, take another case, viz., the case of a contract where both parties must sign, of which the most familiar example is an ordinary lease for years not under seal which, by the conjoint operation of sections 1 and 4 of the statute, must be in writing, signed by the parties making the same. I am referring for the moment to leases before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, which enacted that leases required to be in writing by the Statute of Frauds shall thenceforth be under seal. Where such a lease was signed by the lessee only, he took no interest, and was not bound according to the principle laid in *Soprani v. Skurro* (b). Now, suppose the lessee were to sign before the lessor. Every argument which has been urged to show that a subsequent act cannot turn what is not an agreement into an agreement would apply; but could any one seriously contend that it would make any difference whether the lessor or lessee signed a lease first? The law is clear upon the point. We are not to look at the precise moment at which an assent is given, but at the entire transaction, and if the assent when given does make a contract, that is enough; for the proposal, though prior in time, is in fact a memorandum or note of the terms of that contract, signed by the party to be charged within the meaning of the statute.

The judgment of the Court below must therefore be affirmed. We all approve of the reasoning of Kindersley, V. C., in *Warner v. Willington* (c), who, after all, only restated an old proposition of law.

*Judgment affirmed.*

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## WILLIAMS v. JORDAN.

IN THE HIGH COURT OF JUSTICE, JULY 12, 1877.

[*Reported in Law Reports, 6 Chancery Division, 517.*]

ON the 29th of February, 1876, the Defendants, Robert Jordan, Reuben J. Jordan, and Albert J. Davis, signed the following letter in the presence of a Mr. Sydenham Watson, who alleged himself to be the agent of the Plaintiff, to sell or let the Bijou Theatre in Archer Street, Bayswater, of which the Plaintiff was the alleged owner:—

“Sir,—I hereby agree to rent the Bijou Theatre, Bayswater, together with all appurtenances belonging, on a 7, 14, or 21 years lease, to be computed from Lady Day next, and to contain the usual covenants, at an annual rent of seven hundred and fifty pounds (£750), and to sign an ordinary lease. It is understood that I may be allowed to take

(a) 2 Jac. & Walk. at p. 428.

(b) Yelv. 18.

(c) 3 Drew. 523.

formal possession of the said premises as soon as this offer is accepted, notwithstanding the lease may not be signed.

"Witness :

"*Sydenham J. C. Watson,*

"*Harlesdon.*"

"*Robert Jordan,*

"*Reuben J. Jordan,*

"*Albert J. Davis.*

This letter was given to Watson for delivery to the Plaintiff.

On the 5th of March, 1876, the Defendants received the following letter from Mr. *Sydenham Watson* :—

"*Messrs. R. Jordan. R. J. Jordan, and Albert J. Davis.*

"Dear Sirs,

54 *Russell Square, W. C.*

"*Re Victoria Hall Bijou Theatre, &c.*

"I am happy to inform you that your offer of the 29th ult., to rent these premises upon lease of 7, 14, or 21 years, at £750 per annum, is accepted by the owner of the property, whose solicitor will shortly communicate with you regarding the lease. I may mention that I have seen the surveyor and architect, who certifies that the premises are perfectly safe, being most substantially built, and admirably adapted in every way for the purpose required.

"I remain, Dear Sirs,

"Yours truly,

"*Sydenham Watson.*"

The Defendants did not append their signatures to this letter nor to any other document referring to it.

The Defendants subsequently refused to perform the contract, alleging that they had withdrawn their offer before the letter of the 5th of March, 1876, was written or sent to them, upon which the Plaintiff brought his action for specific performance.

The Defendants, by their defence, denied that the letters constituted a contract or agreement within the provisions of the Statute of Frauds.

*Roxburgh*, Q. C., and *Brett*, for the Plaintiff.

*Chitty*, Q. C., and *Sidney Woolf*, for the Defendants :—

According to Mr. Dart (a), it appears to be now clearly settled that, in order to satisfy the statute, both parties should be specified either nominally or by a sufficient description. Here the letters do not show who the intended lessor is, and there is no other document which is sufficiently connected with the offer to cure the defect: *Warner v. Willington* (b), *Boyce v. Green* (c); *Potter v. Duffield* (d).

[They referred also to *Rossiter v. Miller* (e), and *Catling v. King* (f).]

*Roxburgh*, in reply :—

(a) V. & P. 5th Ed. p. 217. (b) 3 Drew. 523. (c) Batty, 608. (d) Law Rep. 18 Eq. 4. (e) 5 Ch. D. 648. (f) Ibid. 660.

There is an offer to take a lease, signed by the parties to be charged, and an acceptance of that offer by the agent of the Plaintiff by the description or reference of the owners. In *Potter v. Duffield* (a) your Lordship observed: "The statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed," which is the case here (b).

JESSEL, M. R. :—

I must most reluctantly allow the objection, but I think that I am bound to do so. First of all, the letter containing the offer was not addressed to anybody. It begins "Sir," but who "Sir" was does not appear from the letter. It is signed by the Defendants, and that is all. There was a letter of acceptance sent to and received by the Defendants, but that letter is not signed by the Defendants, nor is it referred to in any subsequent letter or document bearing their signature. Now, as I understand the Statute of Frauds, or rather the decisions on that statute, there must be a memorandum or note in writing of some agreement. But the letter of the 29th of February is not an agreement; it is an offer by the Defendants to somebody, I cannot tell who. The letter of acceptance does not show who that somebody is, for there is nothing in it to incorporate it with the original offer, and no document referring to it of subsequent date with the Defendants' signature. In the case of *Warner v. Willington* (c), just as in this case, the lessor's name was not signed, and Vice-Chancellor Kindersley held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action or bill for specific performance. He said: "But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference" (of course he

(a) Law Rep. 18 Eq. 4, 7.

(b) In the case of *Rossiter v. Miller*, 3 App. Cas. 1124, 1140, in which one of the questions raised was whether the expression "the proprietors" was a sufficient description of one of the parties, Lord Cairns said, "I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the owners, and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*. If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre of which I am not proprietor, or to sell the house No. 1 Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid." ED.

(c) 3 Drew. 325, 530.

meant some other document previously existing) "that will cure the defect of the memorandum." There is, I have already said, no such document. I am of opinion that I am bound by *Warner v. Willington* to give effect to this objection, and there must be judgment for the Defendants, with costs.

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SHARDLOW v. COTTERELL.

IN THE COURT OF APPEAL, DECEMBER 3, 1881.

[Reported in *Law Reports*, 20 *Chancery Division*, 90.]

THIS was an appeal by the Plaintiff from a decision of Mr. Justice Kay (a).

*Rigby*, Q. C., and *J. G. Alexander*, for the Appellant:—

If in a contract there is a reference to property in such a way that the subject-matter can be rendered certain by extrinsic evidence, that is sufficient. The whole frame of the conditions shows that some real estate was the subject of sale, and the question is merely of parcel or no parcel; it is impossible ever to describe property in such a way as wholly to dispense with parol evidence. In *Macdonald v. Longbottom* (b) "your wool" was held a sufficient description; in *Ogilvie v. Foljambe* (c) "Mr. Ogilvie's house" and in *Wood v. Scarth* (d) "the premises." There is no uncertainty, the only question is, What property was put up for sale at a certain time? A description which would be sufficient in a will must be sufficient in a contract, and a devise of "the property which I bought from Mr. Cotterell at the Sun Inn on the 29th of March, 1880," would certainly be a good devise.

*Whitehorne*, Q. C., and *Fooks*, *contra*:—

This is a patent ambiguity, and parol evidence is not admissible to explain it: *Dart's Vendors and Purchasers* (e). The word "property" is of the vaguest description, and defines nothing. We do not dispute that, as in *Long v. Millar* (f), parol evidence is always admissible to show to what property a description applies, but it cannot be called in to make a description where there is none. As regards the case of a devise, the Courts have always shown more liberality to wills than to contracts: *Williams v. Lake* (g).

[LUSH, L. J., referred to *Ridgway v. Wharton* (h).]

That establishes only that, if a document is referred to, parol evidence is admissible to show what document is referred to, and *Cave*

(a) 18 Ch. D. 280. The facts are stated in the judgment of the Master of the Rolls.  
 (b) 1 E. & E. 977. (c) 3 Mer. 53. (d) 2 K. & J. 33. (e) 4th Ed. p. 882.  
 (f) 4 C. P. D. 450. (g) 2 E. & E. 349. (h) 6 H. L. C. 238, 257.

v. *Hastings* (a) so explains it. To make this case come within *Long v. Millar* there is required some description in the particulars of sale.

[JESSEL, M. R. :—The memorandum is not in form a complete contract; no price is named. Does not *Long v. Millar* authorize us to join the several documents? Suppose a memorandum in this form: “I agree to buy for £450 the property which was put up for sale at the Sun Inn on the 29th day of March, 1880, by Mr. Cotterell, and which was not then sold.” Would not that be enough?]

In that case there would be a description. *Blagden v. Bradbear* (b) decides the point which arises here: it was held that the receipt could not be connected with the conditions of sale. The principles applicable to the case are illustrated by *Sale v. Lambert* (c); *Potter v. Duffield* (d); *Rossiter v. Miller* (e); Sugden’s Vendors and Purchasers (f).

BAGGALLAY, L. J., referred to *Bleakley v. Smith* (g).]

Suppose the conditions and memorandum turned into a formal document, we should have nothing but “property” as a description, and how can that be held to satisfy the statute; it is a mere reference to a verbal agreement to sell. In *Monro v. Taylor* (h) it was taken for granted that there must be some description. In *Price v. Griffith* (i) the description was “coals, etc.,” which is not nearly so vague as “property,” but yet was held insufficient. In *Caddick v. Skidmore* (j) a better description than we have here was held insufficient. As regards the analogy of a devise, this is like a devise to A. B. of “all that property which I verbally promised yesterday to leave to him;” and that, we submit, would not be valid.

JESSEL, M. R. :—

This case has been argued at some length, but I cannot bring my mind to doubt as to the sufficiency of the description. The case is a short one, and a very remarkable one, as illustrating our law. The Plaintiff bought by auction a house at the Sun Inn, Pinxton, on the 29th of March, 1880, and paid his deposit, for which the auctioneer gave him a receipt in these terms:—“Received of Mr. A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, owner.” It has not been contested that if the receipt had said “on a house purchased” there would have been a sufficient description, but it has been argued that because the word “property” is used the description is insufficient, and Mr. Justice Kay has so decided. There were conditions of sale containing no description of the property, but headed “Property sale at Sun Inn, Pinxton, March 29th, 1880.” At the bottom was the following memorandum, signed by the auctioneer: “The

(a) 7 Q. B. D. 125. (b) 12 Ves. 466. (c) Law Rep. 18 Eq. 1. (d) Law Rep. 18 Eq. 4. (e) 3 App. Cas. 1124. (f) 14th Ed. p. 136. (g) 11 Sim. 150. (h) 8 Hare, 51. (i) 1 D. M. & G. 80. (j) 2 De G. & J. 52.

property duly sold to Mr. Arthur Shardlow, butcher, Pinxton, and deposit paid at close of sale." It was held by the learned Judge in the Court below, and I think rightly held, that having regard to the word "purchased" in the receipt, there was sufficient connection between the two documents to allow them to be read together as saying what was sold, but he came to the conclusion that even taking them together there was not a sufficient description to satisfy the requirements of the Statute of Frauds. Now, I am of opinion that the receipt alone contained a sufficient description, and when we read the two documents together, which I agree with the learned Judge in the Court below in saying that we are at liberty to do, the case of the purchaser is greatly strengthened.

Now, what is necessary to make a binding contract within the Statute of Frauds? In considering this it is well to go back to the statute, because the decisions sometimes gradually drift away (so to speak) from the Statute, and if we rely on them alone we are likely to be misled. The Statute of Frauds, 29 Car. 2, c. 3, enacts by sect. 5 that all devises of land shall be in writing, and signed by the party devising the same, or by some other person in his presence and by his express directions. The 4th section provides that no action shall be brought upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed as therein mentioned. There appears to me to be no distinction between these two sections as to the description required, and a decision as to what is a sufficient description in the one case must be an authority as to what shall be a sufficient description in the other case. What, then, is a sufficient description in writing? No one can say beforehand. You cannot have a description in writing which will shut out all controversy as to parcels, even with the help of a map. I have known a most bitter and long-continued litigation in a case where both sides had most beautiful maps, the contest being between two neighboring proprietors as to the ownership of a ditch. No description can be framed that will prevent all dispute, and the framers of the Statute of Frauds knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check. It could be nothing more: it could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, destruction, and contents of a memorandum which never in fact existed. Looking at the statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, "the estate of A. B. in the county of C.," or "the estate of A. B. which he bought of C. D.," or "the



estate of A. B. which was devised to him by C. D.," would be sufficiently specific. If so, why should not "the property which A. B. bought of C. D. on the 29th of March, 1880" be sufficient? Would anybody doubt that in a will "the property which I bought of C. D. on the 29th of March, 1880," would be a sufficient description? If it is so in a will why not in a contract? I am at loss to understand the reasoning on which the learned Judge in the Court below proceeded.

Let us look at the words in the present case. "Property purchased at £420 at the Sun Inn, Pinxton, on the above date" (that is the 29th of March, 1880), "Mr. George Cotterell, Pinxton, owner." There are here not two, but three specific terms, that on a given day it was sold at a given place, and that it belonged to Mr. George Cotterell. It appears to me that this is an amply sufficient description. True there may be a dispute about what the property was, but so there always may be. It is admitted that the word "house" would have been sufficient, but that term would no more have excluded a dispute than the word "property." I am of opinion, therefore, that the receipt alone contains enough to determine what the thing sold was. When we come to look at the conditions of sale we find a good deal more. [His Lordship then made observations to the effect that the conditions though not expressly showing that the subject of the sale was real estate contained indications that it was.] Then we have at the foot the memorandum, "The property duly sold to Mr. A. Shardlow, butcher, and deposit paid at close of sale." It therefore appears to me there is sufficient description of the property, and with great deference to the learned Judge in the Court below I think his reasons for coming to the contrary conclusion not sufficient. He says that to his mind the word "property" is quite as vague as the word "vendor." In this I cannot agree with him. It is, he says, because of the vagueness of the word that he does not allow parol evidence to be introduced to show what the thing sold was. The learned Judge seems to have forgotten that the word "property" is the word used in the statutory form of conveyance by a debtor for the benefit of his creditors. No one ever doubted that the statutory form was valid, for "property" is sufficiently definite when you mention all the property of the man, though parol evidence is necessary to show what it was. There is no rule requiring an inseparable incident as part of the description; a separable incident is quite sufficient. Has anybody ever doubted that "all that farm formerly in the tenancy of A., which was devised by B. to C.," is a sufficient description, even though the farm was not mentioned in the will, and passed as part of the residue. Then those of us who are old enough to remember common recoveries, may remember the form in the grant to make a tenant to the *præcipe*, "All the lands, tenements, hereditaments, estate whatsoever of which A. B. is

tenant for life," &c. This required extrinsic evidence to show what the properties were, but no one ever doubted that it passed all the lands of which A. B. was tenant for life. The learned Judge says (a), "Suppose for example the vendor were to say, 'I sold at the Sun Inn a certain house, certain plant, certain loose materials upon the ground, and I say what I sold were all these things,' and he gives a list. Suppose the purchaser says, 'I did not buy these things, I did not buy so many,' or 'I bought those things and something else:' is not that the danger which the Statute of Frauds was intended to prevent?" Suppose these words put into a will, "I leave all the property which I bought of George Cotterell on the 29th of March, 1880, to John Smith." Would the learned Judge say that John Smith would not take the property then bought? There may be a contest as to what belonged to Mr. George Cotterell, and when the learned Judge goes on to say, "You must have on the face of the contract a sufficient definite description of the things sold to enable you to introduce parol evidence to show what the articles were to which that description refers," I agree with him, but when he further says that "a mere description of the thing sold as 'property' is not to my mind sufficiently definite to enable any such parol evidence to be adduced," I think that he makes a remark not applicable to the present case, because he takes the word "property" alone, whereas the description is in fact "property of which Mr. George Cotterell is owner, and which was sold on March the 29th, 1880," and that to my mind is a sufficiently definite description. In this particular instance there was only one property which Mr. Cotterell put up on that day for auction, and which was the house in question, and I think for the reasons I have given that the judgment of the Court below must be reversed, and that this appeal must be allowed.

BAGGALLAY, L. J.:—

I also agree in thinking that the receipt was a sufficient memorandum to satisfy the requirements of the Statute of Frauds. If we look at that document we find the name of the vendor, the name of the purchaser, the price, and the signature of an agent who signed on behalf of the vendor, but it is argued that it is too indefinite as regards the description of the property, which is merely described as "property purchased at £420 at Sun Inn, Pinxton, on the above date." In *Dart's Vendors and Purchasers* (b), it is laid down that "a general description of the estate is sufficient if parol evidence can be produced to show what property was intended," and he refers to *Ogilvie v. Foljambe* (c), in which the description of "Mr. Ogilvie's house" was held to be sufficient, and *Bleakley v. Smith* (d), where it was held that the "prop-

(a) 18 Ch. D. 293.

(b) 5th Ed. p. 219.

(c) 3 Mer. 53.

(d) 11 Sim. 150.

erty in Cable Street" was a sufficient description. Lord St. Leonards (a) lays down the rule in the same way. I see no difficulty in applying that doctrine here, and in my opinion the receipt alone contains a sufficient description. But, as has been pointed out by the Master of the Rolls, the receipt and the conditions with the memorandum at their foot may be read together, as the learned Judge in the Court below held, and so reading them we have evidence that there was a sale by auction under conditions of sale which indicate that what was sold was real property, and I think that the two documents together are more than sufficient to furnish a description. I do not assent to the proposition that letters only can be read together. I take it that any documents, whether letters or not, one of which refers to the other, can be read together, and the authority of *Long v. Millar* (b) was hardly required in support of that proposition.

LUSH, L. J.:—

I regard this case as one of considerable importance. The question presented to us is whether the two papers taken together, the receipt and the conditions of sale with the memorandum at the foot of the conditions of sale, contain the essentials of a perfect contract. Now in these two documents we have first the name of the buyer and the name of the seller, we have the price to be paid, and the time when the bargain is to be completed, but it is objected that there is no sufficient description of the thing sold. The argument is that the word "property" is a term used for all kinds of chattel property as well as real estate, and that here we cannot tell whether it be one or the other. But on the face of the documents it is clear that it is property that can only pass by conveyance, because the expenses of the transfer are to be paid by the purchaser. There is no transfer if you buy a horse or anything of that kind. Therefore it is property which requires a conveyance. Then the day is fixed on which possession is to be given up, and this points not to the sale of horses or anything of that kind, but to the sale of real property. I therefore come to the conclusion that a reasonable interpretation of the word "property" in these documents is "real property." If this is so, we have the nature of the property, the name of the seller, the name of the buyer, the price to be paid, and the time when the purchase is to be completed, but it is urged that the property is not described with sufficient certainty. I have been for a long time puzzling myself to know what can be the meaning of this objection. Suppose a horse-dealer having a great number of horses offers one of them for sale; the horse is trotted out and approved of, but the parties differ about the price. Suppose the next day the seller writes

(a) Sug. V. & P. 14th Ed. p. 134.

(b) 4 C. P. D. 450.

and says, "I will let you have that horse for £50," and the buyer writes to accept the offer, would not parol evidence be admissible to show what horse was meant? Or suppose a landowner were to write to another, "I will sell you all my property in Regent Street for £10,000," and the other writes to accept the offer, could it be argued that this was a void contract because the number of the houses was not specified? The ordinary form of a conveyance by the debtor for the benefit of his creditors has been already referred to as showing that a general description is sufficient.

The learned Judge in the Court below reasons on the case of *Ogilvie v. Foljambe* (a). That was a contract by which "Mr Ogilvie's house," with all the fixtures, was to be bought for £14,000. The objection was taken that there was no certain description of the property. The Master of the Rolls said (b), "The defendant speaks of 'Mr. Ogilvie's house,' and agrees 'to give £14,000 for the premises,' and parol evidence has always been admitted in such a case to show to what house and to what premises the treaty related." This has always been considered a leading authority. The learned Judge attempts to distinguish that case by reference to the previous correspondence which had taken place between the parties, but the Master of the Rolls does not put his decision on that ground. In the present case we have "property purchased at £420 at Sun Inn, Pinxton, on the 29th of March, 1880," real property, which was knocked down to the Plaintiff as the highest bidder for £420. Yet the learned Judge, after stating that in *Ogilvie v. Foljambe* there was a description of specific property, goes on to say, "I have not got anything like that here. I have no description; I do not know on the face of the contract, or by anything I am entitled to look at, whether it was real or personal estate, or partly one and partly the other, and I have nothing except the vague description 'property,' and that it belonged to Mr. Cotterell the owner." So that the learned Judge overlooked the conditions of sale which, to my mind, show clearly that the property was real estate. Then in the concluding part of the judgment he says that he is not prepared to carry the law on this subject one hair's breadth beyond the decided cases, and that he thinks he should be doing so if he held the description in the present case to be sufficient. I cannot help thinking that this conclusion is opposed to legal principle. The general rule is, "*Id certum est quod certum reddi potest*," and I am of opinion that this maxim applies here. In *Ogilvie v. Foljambe* parol evidence was wanted just as much as here to show what was the subject-matter of the contract, and the judgment below, if carried to its legitimate results, would establish that no contract can be good within the statute un-

(a) 3 Mer. 53.

(b) 3 Mer. 61.

less it describes the property in such a way that it is wholly unnecessary to resort to parol evidence (a).

## BIRKMYR v. DARNELL.

IN THE KING'S BENCH, MICHAELMAS TERM, 1704.

[Reported in 1 Salkeld, 27.]

DECLARATION, That in consideration the plaintiff would deliver his gelding to A. the defendant promised that A. should re-deliver him safe; and evidence was, that the defendant undertook that A. should re-deliver him safe; and this was held a collateral undertaking for another: For where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking; but it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment, against the original hirer, as well as an *assumpsit* upon the promise against this defendant. This was upon a case stated at the trial for the opinion of the Court; judgment was given for the defendant.

*Et per Cur.* If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *if he does not pay you, I*

(a) In considering cases in which the contract, or the note or memorandum of the terms of the contract, has to be found in a series of documents, it is important to bear in mind the considerations insisted upon by Lord Selborne in the case of *Hussey v. Horne-Payne*, 4 App. Cas. 311, 322. He said:—"I cannot agree with what appeared to be suggested by part of the Appellant's argument, that, because two letters were written, by which the conditions required by the Statute of Frauds would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a Court of Equity ought specifically to perform, without regard to what preceded or what followed. The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said, when sitting in the Court of Chancery, in the case of *Jervis v. Bertridge* (b), that the Statute of Frauds 'is a weapon of defence, not offence,' and 'does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties;' and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them." Ed.

(b) L. R. 8 Ch. at p. 360.

*will*; this is a collateral undertaking, and void without writing, by the Statute of Frauds: But if he says, *Let him have the goods, I will be your paymaster*, or *I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

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MOUNTSTEPHEN v. LAKEMAN (a).

IN THE EXCHEQUER CHAMBER, NOVEMBER 17, 1871.

[*Reported in Law Reports, 7 Queen's Bench, 196.*]

APPEAL by the plaintiff from the decision of the Court of Queen's Bench, making absolute a rule to enter a nonsuit.

The following is the substance of the pleadings and case:—

First count: That defendant was chairman of the local board of health of Brixham, and in consideration that plaintiff would do certain work for the board at request of defendant, as and assuming to be agent of the board, defendant promised plaintiff that he was authorized by the board to make such request; that plaintiff did the work accordingly, but defendant turned out not to be authorized, and plaintiff was unable to make the board pay.

Second count: Alleging defendant's promise to be that he would procure a contract from the board, whereby they should be bound to pay for the work.

Money counts: For work and labor, &c.

Count, added at the trial, alleging defendant's promise to be that, in consideration that plaintiff would do the work for the board, defendant promised to pay for the work, if the board should at any time refuse to pay.

Pleas to the money counts: Never indebted, and to the other counts, 1. That defendant did not promise as alleged, 2. That plaintiff did not do the work at defendant's request as alleged.

At the trial before Kelly, C. B., at the Devon Summer Assizes, 1870, the following facts were proved:—The defendant was chairman of the Brixham Local Board of Health. The plaintiff, a builder and contractor, was employed, in 1866, by the board to construct certain main sewage works in the town. On the 19th of March, 1866, notice was given by the board under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the owners of certain houses to connect their house drains with the main sewer within twenty-one days. Before the expiration of the twenty-one days, Robert Adams, the surveyor of the board, proposed to the plaintiff that he should construct the

(a) Affirmed L. R. 7 H. L. 17, nom. *Lakeman v. Mountstephen*. ED.

connections between the house drains and the main sewer. The plaintiff said that he was willing to do the work if the board would see him paid. On the 5th of April, that is, before the expiration of the twenty-one days, the construction of the connections was commenced by the plaintiff.

The plaintiff stated in evidence that on the day on which the construction of the connections was commenced, and about an hour previous to the commencement, he was leaving Brixham with his carts and men, after the completion of the main sewer, when Adams stopped him, and requested him not to go away as there was more work to be done. The plaintiff asked who was to be responsible for the payment, and Adams said that the defendant was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the following conversation took place: The defendant said, "What objection have you to making the connections?" Plaintiff said, "I have none; if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on, Mountstephen, and do the work, and I will see you paid."

The plaintiff constructed and completed the connections in question in the months of April and May, 1866, under the general superintendence of the surveyor of the board; and the plaintiff, on the 5th of December, 1866, sent in an account to the board debiting them with the amount. The board disclaimed responsibility on the ground that they had never entered into any agreement with the plaintiff, nor by any resolution or order authorized any officer of the board to agree with him for the performance of the work in question.

The plaintiff, for the first time, on the 20th of November, 1869, through his solicitor, applied to the defendant for payment of the work, and the defendant having refused to pay him, commenced this action.

At the close of the plaintiff's case, the counsel for the defendant claimed a nonsuit on the ground that there was no evidence of any liability on the part of the defendant. The learned judge declined to nonsuit, stating his opinion there was evidence to support a count in the form above given, and which he gave the plaintiff leave to add.

The defendant's case was then entered upon, and the defendant denied that any conversation of the kind deposed to by the plaintiff had ever taken place.

The Chief Baron left it to the jury to say whether the conversation did take place; and the jury returned a verdict for the plaintiff for the amount claimed.

Leave was reserved to the defendant to move to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury.

The defendant obtained a rule accordingly, to enter a nonsuit, on the ground that there was no evidence of any original liability on the part of the defendant to the plaintiff for the work to be done; or for a new trial, on the ground that the verdict was against the evidence.

The Court of Queen's Bench afterwards made the rule absolute to enter a nonsuit, on the ground that the defendant's engagement did not amount to an undertaking to be primarily liable for the work; but only to a promise, that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within § 4 of the Statute of Frauds, and not being in writing was void (*a*).

The question for the Court of Appeal was, whether the defendant is entitled to have a nonsuit entered.

Nov. 28. *A. Charles (Lopes, Q. C., with him)*, for the plaintiff. The decision of the Court of Queen's Bench, making the rule absolute to enter a nonsuit, was erroneous. All that was left to the jury was, whether the conversation spoken to by the plaintiff took place or not; this they found in the affirmative; and therefore the question is, what was the contract which this conversation evidenced, coupled with the other circumstances of the case? There was ample evidence from which the jury might have found either an original liability in the defendant, in which case the plaintiff would be entitled to a verdict on the added count, or the money counts; or else there was evidence to sustain a verdict on the first and second counts. But the main argument in the court below proceeded on the question under the Statute of Frauds. The court were wrong in holding such a promise to be within s. 4 of the Statute of Frauds. In order to make a contract a promise to be answerable for the debt, default, or miscarriage of another, there must be a debt, default, or miscarriage of a third person, for which that person has already or does thereafter become liable, and it is not sufficient, as the Court of Queen's Bench held, that the promiser and promisee both expect that by possibility a third party will eventually become liable. [On this point he cited the following authorities: *Chitty on Contracts*, 8th ed., p. 475; 2 *Parsons on Contracts*, p. 301; *Brown on the Statute of Frauds*, ss. 11, 155, 156 (2nd ed.); *Birkmyr v. Darnell* (*b*); *Read v. Nash* (*c*); *Kirkham v. Marter* (*d*); *Harris v. Huntbach* (*e*); *Hargreaves v. Parsons* (*f*); *Couturier v. Hastie* (*g*); *Cripps v. Hartnoll* (*h*); *Green v. Cresswell* (*i*); 1 *Williams' Notes to Saunders*, pp. 230—234; and *Goodman v. Chase* (*j*); but the judgment of the Court renders it unnecessary to do more than refer to them.] Secondly, the promise of the defendant, coupled with the sur-

(*a*) Law Rep. 5 Q. B. 613. (*b*) 1 Sm. L. C. 274 (6th ed.). (*c*) 1 Wils. 305.  
 (*d*) 2 B. & A. 613. (*e*) 1 Burr. 373. (*f*) 13 M. & W. 561, 570. (*g*) 8 Ex. 40;  
 22 L. J. (Ex.) 97. (*h*) 4 B. & S. 414; 32 L. J. (Q. B.) 381. (*i*) 10 A. & E. 453.  
 (*j*) 1 B. & Ald. 297.



rounding circumstances, proved the first or second counts within the principle of *Collen v. Wright* (a), *Simons v. Patchett* (b), and *Cherry v. Colonial Bank of Australasia* (c).

Nov. 29. *H. T. Cole, Q. O.* (*Pindar* with him), for the defendant. The contract to be deduced from the conversation, coupled with the position of all parties at the time, is, that the owners or occupiers of the houses were the parties to be primarily liable, and the promise of the defendant, "I will see you paid," amounted to no more than a guarantee: *Keate v. Temple* (d). Why should the defendant make himself primarily liable? The conversation could only import what the judges in the court below said it did. [He cited notes to *Birkmyr v. Darnell* (*supra*); Throop on Verbal Contracts, vol. i., cc. 7 and 8, pp. 214, 256; *Peckham v. Faria* (e).]

*Charles*, in reply. The supposed liability of the householders would put the contract of the defendant precisely on the same footing as the supposed liability of the local board, which was assumed by the Court of Queen's Bench; and the arguments already addressed to the latter state of facts are equally applicable if the supposed liability be that of the householders; in either case it is not within the Statute of Frauds.

[WILLES, J. Suppose this to be put down in writing, but not signed by C.: "A. having ordered a house to be built by B., B. is desirous of having the security of some third person, and C. is willing to become surety for A., and requests B. to go on with the house accordingly." B. builds the house; but it turns out, when the house is built, that the order supposed by B. and C. to have been given by A. was not by A. but by X., who had no authority from A., and, consequently, there was no liability of A. The contract would be void, independently of the Statute of Frauds, because C. never meant to become liable unless A. was primarily liable; both parties being mistaken, there is no contract at all.]

In the present case there was no such common error; both parties knew that neither the owners nor the local board had given any orders at the time the conversation between the plaintiff and defendant took place.

WILLES, J. [after going minutely through the facts of the case.] At the time the conversation took place it was known, both to the plaintiff and the defendant, that the owners were not liable, and had not interfered in the matter. The plaintiff did not doubt the responsibility of the board in respect of ability to pay, and he wanted no guarantee for this work any more than for the work which he had already done for the board; but he knew he had not got the order of

(a) 8 E. & B. 647; 27 L. J. (Q. B.) 215. (b) 7 E. & B. 568; 26 L. J. (Q. B.) 195.  
(c) Law Rep. 3 P. C. 24. (d) 1 B. & P. 158. (e) 3 Doug. 13.

the board, and so did the defendant, although the contrary seems to have been assumed by the Court of Queen's Bench. Therefore, it is pretty clear that the meaning of the conversation could not be that the defendant would guarantee payment by the board; but it might mean that he had, or would obtain, the order of the board, in which case the principle of *Collen v. Wright* (a) would apply, and the defendant might be liable on the first or second count. But it was competent to a jury to find,—and I need go no further than that, though I think it would have been the proper conclusion to draw,—that the meaning of the answer of the defendant was not “I will be liable as surety for the board, if they become liable to you,” making the contract one of suretyship; but “Whether the board be liable or not, do the work and you shall be paid;” that is, “I undertake to pay you for the work, unless you should happen to be paid either by the board or by the owners, assuming they come forward and pay, though they are not liable.” That appears to me to be the result of the conversation. It is a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not, that is, whether or not there was, or might be, a third person who could be liable for a debt, or guilty of a default or miscarriage in the matter. And it is only in respect of such a third person that the Statute of Frauds applies.

The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr v. Darnell* (b), and in the note to Mr. Evans's edition of Salkeld's Reports it is stated, that, “from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing.” I think that may very well be modified: “Or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void:” so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would

(a) 8 E. & B. 647; 27 L. J. (Q. B.) 215.

(b) 1 Salk. 27.

fail. Again, if there was a contract with reference to a liability, not existing at the time, by reason of the debt not being due at the time, but being payable in futuro, that would come under the word default and there would be no difficulty about that. So, if there was a contract, "If A. B. will employ you to do work, I promise to become surety for him that he shall pay you;" in that case the promise would clearly come within the statute, because, although there was no liability existing at the time when the promise was made, there was a liability contemplated as the foundation for the promise of the defendant. It was a contract of suretyship in respect of a liability to be created; but if the liability were not created, there again the *lex contractus* would prevail. There would be the condition precedent to the arising of any liability as surety, that there should be a principal debtor or established. In all these cases, no doubt, one agrees thoroughly with what was laid down in the Court of Queen's Bench, because you have the case of principal debt contemplated by the parties, and suretyship founded in respect of that principal debt. But in order to bring the case within that rule, you must first of all show that the parties did intend that there should be a principal debtor. In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability, either past, present, or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, are, or shall be liable or not: "Do that work now, and you shall be paid for that work." So that it is a case of principal liability.

We were asked by Mr. Cole to look at a variety of points in this case, upon which he suggested that the true result ought to be a new trial, and not the discharging of the rule directing that a nonsuit should be entered; but the arguments upon that head appear to be excluded by the reservation at the trial, which was to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury; and the rule was to enter a nonsuit, on the ground that there was no evidence of an original liability on the part of the defendant. No objection was taken to the form in which the question was left. Moreover, the question for the opinion of the Court of Appeal is stated to be, whether or not the defendant is entitled to have a nonsuit entered; that is, whether, at the end of the plaintiff's case, the Lord Chief Baron would have been justified in directing that the plaintiff should be nonsuited.

I do not think it necessary to make any further remarks upon the judgment of the Court below. It is quite clear from the report, that the judgment is founded upon the notion of such a case as I put to Mr. Charles, namely, the notion that, upon the facts, the parties must be taken to have supposed the existence of a principal contract with the board, or, taking Mr. Cole's view, with the owners, before there could be any contract arising with the defendant. It is a "supposed liability." The facts are such that the jury might have thought, as I apprehend, correctly, that it was a supposed non-liability of the board that led to what took place between the plaintiff and the defendant. In the judgment of Mr. Justice Blackburn, which I do not presume to criticise, except for the purpose of finding out, as I am bound to do, the reasons on which he proceeded, there is the passage: "We must now take it that the plaintiff, when he agreed to do the work, thought he had got the order of the board, but that he would not have done the work without, in addition to the order of the board through their chairman, the personal promise of the defendant himself that he would see him paid." I am not at all criticising the law as laid down there, except in so far as it conflicts with *Birkmyr v. Darnell* (a); but dealing with that judgment upon the question of fact, upon which it is founded, I humbly conceive that it assumes the fact differently from what it appears upon the case as laid before us. It assumes that the plaintiff thought he had the order of the board, whereas it appears upon the case that the plaintiff would not go on because he thought he had *not* got the order of the board. The result appears to be, that the jury might well, upon the evidence, have found an original liability in the defendant, a liability not falling within the provision of the Statute of Frauds. A nonsuit, therefore, could not have been sustained, and we are bound to reverse the judgment (b).

*Judgment reversed.*

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THOMAS v. COOK.

IN THE KING'S BENCH, MICHAELMAS TERM, 1828.

[Reported in 8 Barnewall & Cresswell, 728.]

**ASSUMPSIT.** The declaration stated that on, &c. a certain partnership in trade between one W. Cook, since deceased, and one N. D. Morris, was dissolved; that it was agreed between W. Cook, since deceased, and Morris, that the former should take upon himself the payment of certain debts (specified in the declaration); and that it was also agreed that a bond of indemnity, executed by W. Cook, since

(a) 1 Salk. 27.

(b) The other judgments are omitted. ED.

deceased, and two other persons, should be given to Morris, to save him harmless from the payment of the said debts. And thereupon afterwards, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and W. Cook, since deceased, execute a bond of indemnity to Morris in the sum of 4100*l*. conditioned to save him harmless from the said debts; the defendant undertook and promised the plaintiff that he, the defendant, would save harmless and indemnify him from all payments, damages, costs, and expenses which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment, that plaintiff was afterwards compelled to pay on account of the said debts the sum of 360*l*., and that defendant had not indemnified him. The second and third counts were in substance the same. The fourth count alleged, that in consideration that the plaintiff, at the request of the defendant, would, as surety for W. Cook, since deceased, together with the said W. Cook and the defendant, make and draw a certain bill of exchange for 500*l*. upon certain persons (named), and would indorse and deliver the same to Morris, in order that he might negotiate the same for his own use, the defendant undertook to indemnify the plaintiff from any loss or damage by reason of his drawing and indorsing the bill. Averment, that plaintiff did draw and indorse the bill in manner aforesaid, and was afterwards by reason thereof compelled to pay it, whereof the defendant had notice, but did not indemnify him. Counts for money lent, paid, had, and received, and on an account stated. Plea, the general issue and statute of limitations. Replication, that defendant promised within six years. At the trial before Park, J., at the Hereford Lent assizes 1828, it appeared that the plaintiff and defendant had executed the bond, and drawn the bill mentioned in the declaration; that the defendant had requested the plaintiff to do so, and promised that he should not be a loser. It was also proved, that on account of payments made by the plaintiff towards the debts specified, and the bill of exchange, a sum of 400*l*. remained due to him in 1825. A promissory note for that sum given by W. Cook, since deceased, to the plaintiff, and bearing date in the year 1823, was then produced to the defendant, and he signed it, and altered the word *I*, at the beginning, to *We*. After this time the plaintiff received from the estate of W. Cook, since deceased, 100*l*., leaving a deficiency of 300*l*. Several acknowledgments of a debt by the defendant within six years were proved. For the defendant it was contended, that the note was void on account of the alteration, and that the plaintiff could not recover on the special counts for want of a written agreement, the promise there laid being to answer for the debt of a third person, and consequently that he could only recover against the defendant as co-surety

on the count for money paid, one moiety of the 300*l*. The learned Judge directed the jury to find a verdict for the plaintiff for 300*l*., and gave the defendant leave to move to reduce it to 150*l*. A rule nisi for that purpose was obtained in last Easter term, against which

*Taunton* and *Chilton* now showed cause. It is true that the promissory note was rendered invalid by the alteration; but although void as a note, it might be received in evidence as a declaration by the party signing it that the money was due, *Rex v. Pendleton* (a), *Dover v. Maestaer* (b). [Bayley, J. You endeavor to use the instrument as a contract, which is contrary to the provisions of the stamp-act.] Even without the note, the plaintiff is entitled to retain the verdict for 300*l*. There was evidence of an antecedent promise by the defendant to refund all that the plaintiff should be compelled to pay. Such a promise is not within the fourth section of the statute of frauds, and need not be in writing. To be within that clause, the promise must be made to a creditor. Here the plaintiff, at the time when the promise was made, was not a creditor. If one bail procures another person to join him by giving a promise of indemnity, that need not be in writing. In some cases, where there was an original consideration, it was held that a promise, although made to pay a creditor of a third person, need not be in writing, *Williams v. Leaper* (c), recognized by Lord Eldon in *Houlditch v. Milne* (d) and by Lord Ellenborough in *Castling v. Aubert* (e).

*Russell*, Serjt. and *Curwood* contra. The declaration itself describes the debts paid by the plaintiff as the debts of W. Cook, deceased, and Morris—and the promise alleged to have been made by the defendant is to indemnify the plaintiff if he is called upon to pay those debts; or, in other words, to pay those debts if the original debtors did not. That is expressly within the words of the fourth section of the Statute of Frauds, which requires all special promises to answer for the debt, default, or miscarriage of another person to be in writing. It is said that the plaintiff was not a creditor at the time when the promise was made: but the cases of *Jones v. Cooper* (f), and *Matson v. Wharam* (g) show that the debt need not exist at the time to be within the statute. [Bayley, J. This in reality was not a promise to pay the debt of a third person, but to indemnify.] That is true, but it was to indemnify against the debt of a third person.

BAYLEY, J. It is provided by the fourth section of the Statute of Frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing,

(a) 15 East, 449. (b) 5 Esp. 92. (c) 2 Wils. 308. 3 Burr. 1886. (d) 3 Esp. 86.  
(e) 2 East, 325. (f) Cowper, 227. (g) 2 T. R. 80.

and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor.—But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds; and if so. there was sufficient evidence to entitle the plaintiff to a verdict for 300*l*.

PARKE, J. (*a*). This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged.\*

*Rule discharged.*

\* See *Wildes v. Dudlow*, L. R. 19 Eq. 198.

## FENTON v. EMBLERS, EXECUTOR OF MAY.

IN THE KING'S BENCH, HILARY TERM, 1762.

[*Reported in 3 Burrows*, 1278.]

THIS was a special case, reserved at nisi prius at the assizes at Abingdon.

It was an action upon the case upon assumpsit, against Emblers, as representative of one May deceased.

The declaration contained six counts; and upon the first four counts, there was a verdict for the plaintiff; and for the defendant, on the sixth. The only doubt was upon the fifth count: which fifth count was, "That the said William May, in consideration that the said Sarah (the plaintiff) would be and become the house-keeper and servant of the said William, and take upon herself the care and management of his family, &c.; and perform the same as long as it shall please the said William and Sarah; undertook and promised to pay wages to the said Sarah at and after the rate of six pounds for one year; and also by his last will and testament to give and bequeath to the said Sarah a legacy or annuity of 16*l*. by the year, to be paid and payable to her yearly and every year from the day of the decease of the said William for and during the term of her natural life; and

(*a*) Littledale, J. was at the Old Bailey.

that she the said Sarah, confiding in the said promise, entered into his service, and became his house-keeper, &c., and continued so for three years and fifty-nine days : but that he the said William had not performed his said agreement, and did not leave her such legacy or annuity, &c."

It was stated in the case, that it appeared upon the evidence, that there was such an agreement between the said William May and the plaintiff; but that it was by parol, and not in writing.

That the plaintiff, in performance of her part of the said agreement, did enter into the testator's service, as housekeeper, &c., and continued in such service till the testator's decease.

That the testator did not give her by last will, or otherwise, the said annuity of 16*l.* per annum, or any other annuity.

A verdict was found for the plaintiff on the fifth count, for 220*l.* subject to the opinion of the court; first, whether the evidence was sufficient to maintain the action upon it: secondly, whether the agreement therein set forth ought not to have been in writing.

Mr. *Hall*, for the defendant, objected—First, that this evidence is not sufficient to prove the special agreement laid in the fifth count; which ought to be proved precisely. He said there was a material variance between the case laid in the declaration, and the case proved. For, the case laid in this fifth count in the declaration is not a hiring for a year; because either party was at liberty to put an end to the contract: but the case proved is a general hiring; which, in construction of law, is a hiring for a year.

Secondly, that by the Statute of Frauds, (29 C. 2, c. 3, § 4,) this agreement, as it was not to be performed within a year, ought to have been reduced into writing. The statute says "No action shall be brought, whereby to charge any executor or administrator, upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This is a promise of a legacy, by an instrument revocable at pleasure. It would be extremely inconvenient to establish promises of this kind, not reduced into writing. The present agreement could not be performed, on May's part, within a year: for a whole year from his death was to elapse, before the annuity or any part of it would become payable.

He cited 1 *Ld. Raym.* 316, *Smith v. Westall*; and relied on a case of *Reynolds v. Spencer Cowper*, 'in Scacc,' in 1726, *Viner*, tit. Contract and Agreement, p. 524, § 47, (which case he said he had ordered to be searched, and found it to be so;) where the rule laid down is—"That



a parol promise to be performed upon a contingency which may or may not happen within a year after the making, is void, within the Statute of Frauds."

Mr. *Stowe*, contra, for the plaintiff, insisted first, that the evidence does support the declaration; and that the fact is precisely proved.

Secondly, that it was not necessary that this agreement should be reduced into writing. The action is brought for May's not having done what he ought to have done in his lifetime; so that it might and should have been done within the year. This consideration is sufficient, at common law, to raise a promise. The Statute of Frauds does not affect this case. Mr. Hall's doctrine would overturn all the cases upon verbal general contracts of matrimony, where the defendant did not actually promise "To marry within a year."

He cited two cases in point: viz. 1 Salk. 280, Anonymous, P. 5 W. & M. C. B. and the case of the promise to pay 20*l.* on marriage, mentioned in 1 Ld. Raym. 316, 317, *Smith v. Westall*.

Mr. *Hall*, in his reply,—Observed, that this is a method of binding the assets, without making a will.

LORD MANSFIELD. There is only that case in the Exchequer, in 1726, that can make the least doubt. By the other cases, it seems settled.

There is nothing in the objection about his leaving it by his will: for, there is nothing testamentary in a promise "To leave at his death."

The case in 1726, in the Exchequer, can not be rightly represented to us: for, as it is represented, one of the two resolutions, viz. that upon the statute of limitations, is wrong to the last degree, and obviously so to every body. It is represented to have been there resolved "That that statute bars eventual rights, from the time of the promise made, (after the six years are elapsed:)" whereas no one can doubt but that the bar only takes place from the time when the right accrued, and not from the time of making the promise.

MR. JUSTICE DENISON. The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year: and the act cannot be extended further than the words of it. Skinner, 353. *Peter v. Compton*, proves the distinction of a contingency, as I have stated it, as fully and clearly as possible. It was an action upon the case upon an agreement, in which the defendant promised, for one guinea, "To give the plaintiff so many at the day of his marriage." The question was, "If such agreement ought to be in writing:" for, the marriage did not happen within a year. The Chief Justice (HOLT,

before whom it was tried,) advised with all the judges, and by the greater opinion (for there was diversity of opinion, and his own was *à contra*) “Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary; for, the contingent might happen within the year: but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise, not.”

Mr. JUSTICE WILMOT concurred; and agreed with the reason of the case in *Salk*. 280. “That by possibility, the ship might have returned within the year; though by accident it happened that it did not: and the clause in the statute only extends to such promises, where, by the express appointment of the party, the thing is not to be performed within a year.”

LORD MANSFIELD. As to the variance, there is nothing in that objection.

Let the *postea* be delivered to the plaintiff.

### CHERRY *v.* HEMING AND NEEDHAM.

IN THE EXCHEQUER, DECEMBER 5, 1849.

[*Reported in 4 Exchequer Reports*, 631.]

THIS was an action of covenant on an indenture, dated the 31st of March, 1836, whereby the plaintiff assigned certain letters patent to the defendants, who covenanted to pay the plaintiff 840*l.*, by instalments extending over several years, subject to a proviso, that if, at the expiration of twelve months from the date of the indenture, the defendants should not approve of the working of the patent, and should give notice of their disapprobation, and of their intention to sell the patent, then the payment of the first instalment should be suspended; and if, having given such notice, the defendants should within six months sell the patent, then the covenant should cease and determine (*a*). The defendants pleaded *non est factum*.

At the trial, before Platt, B., at the Middlesex Sittings after Easter Term, 1849, it appeared that the defendant Needham had executed the deed, and there was the signature to it of all the parties, except that of the defendant Heming. There was, however, a seal at the foot of the deed for each party, being the seal ordinarily used in the office of the plaintiff's attorney who prepared the deed, and who had attested the execution of the defendant Needham. The deed was produced out of the custody of Heming. The defendants had endeavored to work

(*a*) See the declaration, 2 *Exch.* 557.

the patent, but, being dissatisfied with it, sent the following notice in the hand-writing of the defendant Heming, and signed by both the defendants :—

“In pursuance and by virtue of the proviso in that behalf, contained in an indenture bearing date the 31st of March, 1836, and made between Elizabeth Cherry of the first part, George Weldon of the second part, John Ratliff of the third part, and the undersigned Dempster Heming and Joseph Smith Needham of the fourth part, We, the said Dempster Heming and Joseph Smith Needham, do hereby give you notice that we do not approve of the working and exercising of the letters patent and invention assigned by the said indenture to us ; and we do further give you notice, that it is our intention bona fide to sell or otherwise duly dispose of the said letters patent and premises, within six calendar months after the date of this notice, in any manner, to any person or persons willing to purchase the same, for the best price in money that can be reasonably obtained for the same ; and we do further give you notice, that we shall pay, retain, and apply the money to arise from such sale in manner directed in and by the said indenture.”

It was objected, that there was no evidence of the execution of the deed by the defendant Heming ; but the learned Judge ruled that there was evidence for the jury. It was also objected, that this was a contract within the 4th section of the Statute of Frauds, 29 Car. 2, c. 2, and ought, therefore, to have been signed by the defendant Heming. His Lordship was of opinion that a deed was not within the meaning of that statute, and a verdict was found for the plaintiff.

*Knowles* having obtained a rule nisi for a new trial, on the ground of misdirection,

*Watson* and *T. Jones* showed cause (a).—Assuming that a contract by deed is an agreement within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, this deed did not require to be signed, for it was wholly performed on the one part by the plaintiff, and all that remained to be done on the other was payment. The statute only applies where the agreement is not to be performed by either party within the year. In this case the whole consideration for the promise to pay the money was executed. It is the same in principle as *Hoby v. Roebuck* (b), and *Donellan v. Read* (c). [Parke, B.—There are some observations on the latter case in the note to *Peter v. Compton*, 1 Smith's Lead. Cas. 144. However, *Donellan v. Read* is not at variance with *Peter v. Compton*, because Holt, C. J., disposed of that case by saying it did not appear that the agreement was not to be performed within the

(a) Upon the objection, that there was no evidence of the execution of the deed by the defendant Heming, the Court stopped *Watson*, saying that there was clearly evidence to go to the jury. Parke, B., referred to *Hudson v. Revett*, 5 Bing. 368.

(b) 7 Taunt. 157.

(c) 3 B. & Ald. 899.

year.] It is in accordance with what was said by Abbott, J., in *Bracegirdle v. Heald* (a). But the statute does not apply to deeds; its object was the prevention of fraud in respect of parol agreements, and not to affect such solemn instruments as deeds. That is evident from the recital. The question arose in *Cooch v. Goodman* (b), but was not decided. [Parke, B.—Mr. Preston, in a note to his edition of Sheppard's Touchstone (c), treats as a mistake the passage in Blackstone's Commentaries (d), in which it is laid down that the Statute of Frauds revives the Saxon custom of *signing*; and in page 60, where it is said, "It appeareth that the putting to or subscribing of the parties' name or mark to the deed he is to seal is not essential; for a deed,"—Mr. Preston adds,—even since the Statute of Frauds and Perjuries, "may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered."] To render an agreement good, some consideration must be expressed on the face of it; and if the word "agreement" in the statute includes deed, a consideration must be stated in them, although none is required to support them. The inference, therefore, is, that the statute means such agreements only as require a consideration to be expressed on the face of them. In a plea of an agreement within the statute, it is necessary to aver that the agreement is in writing; but a deed is never pleaded as an agreement signed by the parties. Even if the statute does apply, there is in this case a sufficient memorandum in writing; for the notice of the 31st March, 1837, which was signed by the defendants, expressly refers to and adopts the deed: *Schneider v. Norris* (e), *Saunderson v. Jackson* (f). It is the same as if a letter had been written by the defendants, in which they acknowledged that on a certain day they had made such an agreement which would be clearly a note or memorandum within the statute; *Coles v. Trecothick* (g).

*Knowles* and *Bramwell*, in support of the rule. Deeds are within the mischief which it was the object of the statute to prevent. [Parke, B.—The object was to render the evidence certain. In *Aveline v. Whisson* (h), which was an action of covenant on a lease, a plea that the indenture was not *signed* by the lessor, or any agent authorized in writing, was held bad. That shows that the first section of the statute does not apply to deeds.] An agreement is not the less an agreement because it is under seal. [Alderson, B. Your argument must go this length: that a deed sealed and attested, but not signed, is no agreement under the Statute of Frauds.] In Smith's Mercantile Law (i) it is said, that the cases in which it is held that the statute does not apply to agreements, one part of which is to be performed within a

(a) 1 B. & Ald. 722. (b) 2 Q. B. 580. (c) Page 56. (d) Vol. 2, p. 306. (e) 2 M. & Sel. 286. (f) 2 Bos. & P. 238. (g) 9 Ves. 234. (h) 4 M. & G. 801. (i) Page 440, 4th edit.

year, and the other not, is opposed to the older authorities, and that the word "agreement" has been frequently construed to mean all that is to be done *on both sides*. An agreement includes both the consideration and promise. Expanding the language of the statute, it means any arrangement between the parties where that which is the consideration for the other party's acting is not to be performed within the year. Performance is not complete until both parties have performed their promises.

PARKE, B. This rule must be discharged. With respect to the question, whether this is an instrument within the Statute of Frauds, I think that *Donellan v. Read* is an answer; and, in my opinion, that case was rightly decided. The question turns upon the construction of the words "not to be performed;" and in *Donellan v. Read* the Court considered that those words meant, not to be performed *on either side*, and did not include cases where the contract was performed on the one side. That was certainly in accordance with the opinion expressed by Lord Tenterden in *Bracegirdle v. Heald*. If *Donellan v. Read* had been simply a decision on a doubtful point, we ought to be bound by it, unless manifestly wrong; and the learned observations of Mr. Smith are not sufficient to induce me to say that it was wrongly decided. The case of *Peter v. Compton*, which he relies on, does not support his view. All that can be said of that case is, that, there being two answers to the Statute of Frauds, Lord Holt gives one which is satisfactory, namely, that the agreement might have been performed within the year. It is unnecessary to give an opinion on the other points; but I must own that I think a deed is not within the Statute of Frauds, because, in my opinion, that statute was never meant to apply to the most solemn instrument which the law recognizes. I also think that the notice which refers to the deed would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the statute. I do not mean to be concluded by this expression of my opinion on the two latter points, but only to state my present impression.

ALDERSON, B. I also think that *Donellan v. Read* is good law; but even if it were not, this case would not require its assistance, because, this being the case of a deed, it must be taken to have been sealed by the parties in due form, and the statute does not apply to such instruments, but only to parol agreements.

ROLFE, B. I am strongly inclined to think that the statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail

testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

PLATT, B., concurred.

*Rule discharged.*

## BRITAIN *v.* ROSSITER.

IN THE COURT OF APPEAL, MARCH 4, 1879.

[*Reported in Law Reports, 11 Queen's Bench Division, 123.*]

### ACTION FOR WRONGFUL DISMISSAL.

At the trial it appeared that the plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff entered upon the defendant's service upon Monday the 23rd. The final arrangement between the parties was arrived at upon the Saturday.

The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the Statute of Frauds, s. 4. At the trial before Hawkins, J., the verdict was entered for the defendant upon the ground, first, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the Statute of Frauds, s. 4; secondly, that there was no evidence of a new contract on Monday, April the 23rd, it not being proved that the contract made on the previous Saturday was altered or rescinded.

The Exchequer Division having refused a new trial on the ground of misdirection,

1878. May 29. *Firth* moved in this Court, by way of appeal; he contended first, that the contract of service for one year was to begin from Monday, the 23rd of April, and therefore that it was a contract to be performed within a year; secondly, that the plaintiff could not be dismissed without notice, a verbal contract being in existence; thirdly, that the contract having been partly performed, was taken

out of the Statute of Frauds, s. 4. As to the first point he cited *Cawthorne v. Cordrey (a)*.

BRETT, L.J. It seems to me that this contract is within the Statute of Frauds, s. 4. I take the evidence to be clear in this case; the contract was made on the Saturday, and the terms of the contract were that the plaintiff was to commence his service on the Monday, and to serve for a year from the Monday, and to be paid for a year from the Monday; therefore the contract was not to be performed within a year, and falls within the Statute of Frauds, s. 4. It was contended that *Cawthorne v. Cordrey (a)* was contrary to our decision. It seems to me that that case contains two things, one a decision, and the other a dictum. The decision is not against our judgment; for it was that although the parties spoke to each other on a Sunday there was evidence upon which the jury might find that the contract was made on the Monday, and that that contract was for service for a year from that Monday, and that the service was to be performed within a year from that time. That decision was in accordance with all the other cases. If the contract was made on the Monday, and if the service was to commence on the Monday, it is obvious that the service was to be performed within one year from the making of the contract. There was, however, a dictum of Willes, J., which seems to be supported by the opinion of Byles, J.; these are great authorities; and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract, but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was founded upon a fiction, namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum and carry it to the length of a decision. It is not necessary to say so here, because the case has not arisen. This contract was made on the Saturday, and the service was not to begin until the Monday, that is, not the next day to Saturday, but the day save one after. The dictum does not apply. To say that the Sunday is not to be counted in the year's service would not do, because if one Sunday is not to be counted, no Sunday is to be counted. As to *Cawthorne v. Cordrey (a)* the decision is not different from other cases; as to the dictum, we can say nothing about it in this case, because the point does not arise. Therefore we have not to overrule *Cawthorne v.*

(a) 13 C. B. (N. S.) 406; 32 L. J. (C. P.) 152.

*Cordrey* (*supra*) either as to its decision or its dictum. I think that the contract falls clearly within the statute and within the principle of *Bracegirdle v. Heald* (a). Therefore no rule will be granted as to the point whether the contract is within the statute; but the plaintiff may take a rule upon the questions whether the operation of the Statute of Frauds, s. 4, may be defeated by part performance, and also whether the plaintiff was entitled to any notice of dismissal, a verbal contract being in existence.

COTTON and THESIGER, L. JJ., concurred.

1879. March 4. *J. C. Lawrence*, Q. C., and *P. B. Hutchins*, showed cause. The plaintiff cannot recover in this action: *Snelling v. Lord Huntingfield* (b) shows that the express verbal contract of Saturday, the 21st of April, was still in existence, and that no fresh contract can be implied from acts done in pursuance of it. That contract was for a year's service to commence at a future day, and was therefore a contract not to be performed within a year: *Bracegirdle v. Heald* (a); *Banks v. Crossland* (c); nevertheless, whilst it remained unrescinded no other contract between the parties can be implied. The words of the Statute of Frauds, s. 4, are express, and no action can be brought upon a contract falling within its prohibition: *Leroux v. Brown* (d). The fact that the contract has been partly performed, does not affect the position of the parties: *Giraud v. Richmond* (e). The equitable doctrine of part performance, whereby the operation of the Statute of Frauds has been defeated, has always been confined to contracts for the sale and purchase of lands, and has not been extended to contracts of other kinds.

*Firth*, in support of the rule. A contract falling within the prohibition of the Statute of Frauds, s. 4, is void to all intents and purposes: *Carrington v. Roots* (f); *Reade v. Lamb* (g); *Inman v. Stamp* (h). A contract that is void in part is void altogether: *Thomas v. Williams* (i). Therefore the contract of Saturday the 21st of April may be treated as no contract, and a fresh contract of service may be implied from the acts of the parties.

As to the doctrine of part performance, it is true that the Court of Chancery formerly applied it only to contracts for the sale of land, and there may have been a difficulty in decreeing specific performance of a contract for personal services: *Pickering v. Bishop of Ely* (j); *Johnson v. Shrewsbury and Birmingham Ry. Co.* (k). But the Court of Chancery would not allow the provisions of a statute to defeat a claim, which good conscience required to be carried out: *Bond v. Hopkins* (l); *Morphett v. Jones* (m). The defence set up by the de-

(a) 1 B. & Ald. 722. (b) 1 C. M. & R. 20. (c) Law Rep. 10 Q. B. 97. (d) 12 C. B. 801.  
 (e) 2 C. B. 835. (f) 2 M. & W. 248. (g) 6 Ex. 130. (h) 1 Stark. 12.  
 (i) 10 B. & C. 664. (j) 2 Y. & C. (Ch.) 249. (k) 3 D. M. & G. 914.  
 (l) 1 Sch. & Lef. 413. (m) 1 Swan. 172.



fendant is wholly against good conscience. And now by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 7, the doctrine of equity may be applied to cases decided in the Common Law Divisions.

BRETT, L. J. Upon the best consideration which I can give to this case, it seems to me that this rule should be discharged. I think that Hawkins, J., was right, and that the Exchequer Division was also right. It was clearly established that on Saturday, the 21st of April, a contract of service was in express terms entered into between the plaintiff and the defendant that the plaintiff should serve the defendant for one year, the contract to commence the Monday following. It cannot be disputed that a contract of that kind is within the 4th section of the Statute of Frauds, that is to say, it is a promise founded upon a sufficient consideration, but it being only verbal neither party can bring an action upon it so as to charge the other. It is, however, contended that as the plaintiff did on Monday, the 23rd of April, enter into the defendant's service and continue in it for some months, another contract to serve for a year ought to be implied, attended with the same consequences as the original contract, but outside the Statute of Frauds. It is alleged that this contract can be implied, because the contract originally entered into is void. But, according to the true construction of the statute, it is not correct to say that the contract is void; and, in my opinion, no distinction exists between the 4th and 17th sections of the statute: at all events, the contract is not void under the 4th section; the contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing. At the bar reliance was placed upon *Carrington v. Roots* (a), and *Reade v. Lamb* (b); in the former case Parke, B., said: "I think the right interpretation of" the 4th section of the Statute of Frauds "is this, that an agreement which cannot be enforced on either side is as a contract void altogether;" in the latter, Pollock, C. B., said: "*Carrington v. Roots* (a) is in effect a decision that, for the purposes of the present question, there is no distinction between the 4th and 17th sections of the Statute of Frauds, and that not only no action can be brought upon an agreement within the 4th section of that statute if it be not reduced into writing, but that the contract is also void." With regard to these dicta it is enough to say that the doctrine thereby laid down was un-

(a) 2 M. & W. 248.

(b) 6 Ex. 130.

necessary for the decisions in those cases : for it being clear that no action can be brought on the verbal contract itself, it is also clear that neither party can be held liable upon it indirectly in any action, which necessitates the admission of the existence of the contract. The two cases which I have mentioned were considered in *Leroux v. Brown* (a), and Jervis, C. J., undoubtedly took the same view of them as I do and gave the interpretation necessary for that case, namely, that the contract is not void, but only incapable of being enforced, and that any claim which depends upon the contract as such cannot be maintained. If the contrary view had prevailed, it would have been decided in that case that the Statute of Frauds, s. 4, had a territorial operation; whereas if it applies merely to the enforcement of the contract, then it is a statute with respect to the procedure of the English Courts, and it is applicable to contracts made abroad as well as in England. Moreover, the case of *Snelling v. Lord Huntingfield* (b) has not been overruled by subsequent cases, but the doctrine there laid down has been strongly supported by subsequent cases, and in my opinion it certainly ought not to be overruled now. In my view the contract entered into on the 21st of April was not void but existing, and from a part performance of it a fresh contract ought not to be implied. The plaintiff, therefore, is driven to rely upon the original contract, but he cannot maintain an action upon that, inasmuch as it is not in writing.

It has been further contended that as the contract of the 21st of April has been partly performed, it may be enforced, notwithstanding the Statute of Frauds, and that the equitable doctrine as to part performance may be applied to it. It is well known that where a contract for the sale of land had been partly performed, Courts of Equity did in certain cases recognize and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of Courts of Equity. Those Courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the Court of Chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the Judicature Acts: can we so extend it now? I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure. Before

(a) 12 C. B. 801.

(b) 1 C. M. &amp; R. 20.

the passing of the Judicature Acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff cannot maintain this action for breach of contract.

COTTON, L.J. We refused to grant a rule on the ground that the contract entered into on Saturday, the 21st of April, was to be performed within a year, and therefore not within the operation of the 4th section of the Statute of Frauds: the contract clearly was within that enactment: on the other points we granted a rule, but after having heard the arguments on behalf of the plaintiff, I think that the rule for a new trial must be discharged. It has been contended that although the express contract cannot be enforced, nevertheless a contract which can be enforced may be implied from conduct of the parties, and it has been argued that the rule does not apply which forbids a contract to be implied where an express contract has been concluded, because the contract was void under the provisions of the Statute of Frauds, s. 4: but in my opinion that is not the true construction of the enactment, which provided that no action shall be brought to charge any person upon the verbal contract.

In the first place, I may observe that to hold that this enactment makes void verbal contracts falling within its provisions, would be inconsistent with the doctrine of the Courts of Equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them: and Courts of Equity were accustomed to dispense with that evidence in certain instances. During the argument some decisions were relied upon as showing that the contract in the present case was void. In *Carrington v. Roots* (a), certain expressions were used by the judges which indicated that in their opinion a verbal contract falling within s. 4 was void; but I think that their language when carefully analyzed merely means that the contract was not enforceable either directly or indirectly by action at law. I think it unnecessary to go into the case of *Reade v. Lumb* (b): it was a case decided upon special demurrer, and the question to which the attention of the judges was directed, was whether the pleadings were correct in point of form.

It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the Court will not allow

(a) 2 M. & W. 248.

(b) 6 Ex. 130.

one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part-payment of the purchase-money would defeat the operation of the statute. But it is well established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, *primâ facie*, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken. Does this doctrine, when so explained, apply to the present case? I will first mention the provisions of the Judicature Act, 1873, s. 24, subs. 4, 7. These provisions enable the Courts of Common Law to deal with equitable rights and to give relief upon equitable grounds: but they do not confer new rights: the different divisions of the High Court may dispose of matters within the jurisdiction of the Chancery and the Common Law Courts; but they cannot proceed upon novel principles. Could the present plaintiff have obtained any relief in equity before the passing of the Judicature Acts? I think that he could not. The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the Court of Chancery never interfered.

THESIGER, L. J. Two questions must be considered in this case—first, whether the plaintiff could maintain an action at law: secondly, whether, if he could not maintain an action at law, he could maintain a suit in equity. I am compelled to subscribe to the opinion that the plaintiff had no remedy either at law or in equity. I have been unwilling to come to this conclusion, because it is manifestly unjust that where a contract of hiring has been acted on for a certain time, one party who has had the advantage of it should be able to put an end to it; and I should have been glad to decide that the plaintiff was entitled to a reasonable notice of dismissal.

First, has the plaintiff a right of action at law? It is clear that a contract was made on Saturday, the 21st of April, and it cannot be

contended that a contract made at that date to commence from the 23rd of April is not within the 4th section of the Statute of Frauds. It is necessary to consider what is the effect of the statute upon such a contract; is it that the contract is wholly null so that it does not prevent the proof of any other contract, or is it that the contract exists but cannot be enforced? Certain dicta are to be found in the books from which it might appear that some of the judges have considered the verbal contract as absolutely void. But if those dicta are carefully examined, it will be found that they are not necessary for the decision of the cases in which they appear, and upon referring to subsequent cases it will be found that it has been decided in clear terms that the verbal contract is not actually void. It is impossible to say that the words of the statute make the verbal contract void. That a verbal contract is not void, is proved by the circumstance that where one party has signed the contract and the other has not, the party who has signed may be charged upon it, but that the party who has not signed cannot be charged. It may also be urged with some show of reason that though there is a difference in language between the 4th and 17th sections of the Statute of Frauds, they are substantially identical in construction, and *Carrington v. Roots* (a) and *Reade v. Lamb* (b) may perhaps be cited in support of that argument. And it is plain that verbal contracts under the 17th section are not absolutely void for all purposes, for the section provides that part performance by payment or acceptance and receipt of goods shall authorize the court to look at the terms of the contract, although it is not in writing. But I need not discuss this question further, for in *Snelling v. Lord Huntingfield*, (c) which has never been overruled, but on the contrary has been often followed, it was held that a contract not enforceable by reason of the Statute of Frauds, sect. 4, nevertheless existed, and no contract can be implied where an express contract exists. I think that we are bound by the authority of that case. There was, therefore, in existence a contract made in express terms on Saturday, the 21st of April, and the plaintiff cannot sue upon it, as it is not in writing. It appears to have been held that, though there may be no right to recover on an executory contract, nevertheless, if it has been executed to the extent of the contractee entering upon the service, that is enough to entitle him to be paid for his services, and if we were not bound by authority it would be difficult to understand why if the plaintiff can sue for services rendered, he should not equally be entitled to allege that he shall not be dismissed without notice or without such notice as was stipulated for in the contract. But in *Snelling v. Huntingfield* (c) the Court of Exchequer appears to have thought that the contractee can recover for services rendered but not for dismissal without notice. This seems to have been the construction at Common Law.

(a) 2 M. &amp; W. 248.

(b) 6 Ex. 130.

(c) 1 C. M. &amp; R. 20.

If we turn to Equity, we find that it has been held as regards a sale of land, that when there has been an entry by one party to the contract, that is an overt act apparently done under a contract which entitles the Court to look at the contract to see to what contract the overt act is really referable. I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of Equity is based upon the theory that the Court will not allow a fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of Courts of Equity as to the principles of relief, and as to the instances to which the doctrine of part performance is to be applied. Therefore, as we cannot clearly see that the equitable doctrine of part performance ought to be extended to contracts of service, I think that we ought to keep within the limits observed by the Court of Chancery before the passing of the Judicature Acts, 1873, 1875\*.

*Rule discharged.*

\* See *Maddison v. Alderson*, 8 App. Cas. 467. Ed.

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## BAILEY AND ANOTHER v. SWEETING.

IN THE COMMON PLEAS, JANUARY 17, 1861.

[*Reported in 9 Common Bench, New Series, 843.*]

THIS was an action brought to recover a sum of 76*l.* 14*s.* 3*d.* for goods bargained and sold. The defendant paid 38*l.* 3*s.* 9*d.* into court, and as to the rest of the claim pleaded never indebted.

At the trial before Erle, C. J., at the sittings in London after last Easter Term, the following facts appeared in evidence:—The defendant was a furniture-dealer at Cheltenham: the plaintiffs were manufacturing upholsterers and cabinet-makers in London. In July, 1859, the defendant called at the plaintiffs' place of business in London, and then purchased five chimney-glasses (a "job lot," as it was called), *which were to be paid for by check on delivery*. He at the same time purchased other goods *on credit* to the amount of 39*l.* 10*s.* 9*d.*, some of which had to be made for him. The chimney-glasses were packed and sent by carrier, addressed to the defendant at Cheltenham. They were, however, found to be so damaged when they reached their destination that the defendant refused to receive them, and at once communicated such refusal to the plaintiffs.

The other goods were subsequently forwarded at three different times, with separate invoices, and were duly received by the defendant. The value of these parcels was covered by the payment into court: and the question was, whether the defendant was liable in respect of the chimney-glasses, the value of which with the cases was 38*l.* 10*s.* 6*d.*

On the part of the plaintiffs it was insisted that the whole of the goods were sold under one contract, and that the case was taken out of the Statute of Frauds (29 Car. 2, c. 3, s. 17) by the acceptance of part. They also relied upon the following letter addressed to them by the defendant, as being a sufficient memorandum to satisfy the requirements of that statute:

“Cheltenham, December 3rd, 1859.

Gentlemen,—In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was, the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time. With regard to the other items, viz. 11*l.* 4*s.* 9*d.*, 14*l.* 13*s.* and 13*l.* 13*s.*, for goods had subsequently (less cases returned), those goods are I believe subject to the usual discount of 5*l.* per cent.: and I am quite ready to remit you cash for these parcels at once, and, on receipt of your reply to this letter, will instruct a friend to call on you and settle accordingly.”

For the defendant it was insisted that the contract for the chimney-glasses was a separate and distinct contract, and void for want of a sufficient memorandum.

His lordship (at counsel's request) left it to the jury to say whether the bargain for the chimney-glasses was a separate and distinct bargain from that for the rest of the goods, telling them, that, if they were of that opinion, they must find for the defendant.

The jury found that the two were separate and distinct transactions, and accordingly returned a verdict for the defendant.

*Hawkins*, Q.C., in Trinity Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiffs for 38*l.* 10*s.* 6*d.*, on the ground that the defendant's letter of the 3rd of December, 1859, was a sufficient memorandum or note in writing to satisfy the statute, or for a new trial on the ground that the verdict was against evidence.

*H. James* and *Tompson Chitty* showed cause. The whole was not necessarily one contract because all the goods were purchased at one and the same visit to the warehouse. In truth, the contract for the chimney-glasses for ready money was totally distinct from that for the other goods, which were bought on credit. It was clearly a question for the jury. The more important question, however, is, whether

the defendant's letter of the 3rd of December, 1859, was a sufficient note or memorandum of the bargain to satisfy the statute. The subject is adverted to in Mr. Justice Blackburn's treatise on the Contract of Sale, p. 66, where the learned author says: "It sometimes happens, that, after a dispute has arisen, a party in a letter signed by him recapitulates the whole terms of the bargain, for the purpose of saying that the bargain is at an end for some reason which is evidently insufficient in law. It has never been decided whether such an admission of the terms of the bargain, signed for the express purpose of repudiation, can be considered a memorandum to make the contract good; but it seems difficult on principle to see how it can be so considered. The parties may either of them put an end to the contract at any time whilst it is not good, with cause or without cause; and a memorandum of the terms comes too late to make a contract good which is already put an end to. There is evidently a great difference between a writing which after the dispute has arisen mentions the terms of the contract for the purpose of showing that the bargain is at an end, and one which recognizes them as still subsisting. I know only of three cases in which this point could have been decided; and, though in each of them the memorandum was held insufficient, they seem to have been decided on special grounds.

*Hawkins, Q. C., and Kemplay*, in support of the rule (a).

ERLE, C. J. This was an action for goods sold and delivered. There was an oral contract for the sale and delivery of the goods in question: but the defendant relies upon the Statute of Frauds, and contends that there was no note or memorandum of the bargain in writing to satisfy that statute. After the making of the oral contract, however, there was a letter written by the vendee to the vendors, which contains this statement,—“The goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*” (the goods in dispute), which goods I have never received, and have long since declined to have, for reasons made known to you at the time,”—the reason being, that, in consequence of the negligence of the carrier through whom they were sent, the goods were damaged. Now, the first part of that letter is unquestionably a note or memorandum of the bargain: it contains a description of the articles sold, the price for which they were sold, and all the substantial parts of the contract. If it had stopped there, there could be no dispute as to its being a sufficient note or memorandum to satisfy the statute. It is clear that the note or memorandum may be made after the time at which the oral contract takes place; and, to my mind, that which passed orally between the parties on the subject of the bargain in July, was in the nature of an inchoate

(a) The arguments are omitted. ED.



contract, and the subsequent letter had a retroactive effect, making the contract good and binding. The latter part of the defendant's letter in effect says, "I decline to take the goods because the carrier damaged them in their transit:" and it is contended, on his part that the acknowledgment at the beginning of the letter does not constitute a sufficient memorandum within the statute, because the latter part contains a repudiation of his liability,—relying much on the passage cited from my Brother Blackburn's book on the Contract of Sale, where it is suggested that a subsequent acknowledgment in writing has not the effect of making the contract good, if it is accompanied by a repudiation of the defendant's liability under it. A case is referred to of *Rondeau v. Wyatt*, 2 H. Bl. 63, where an answer to a bill of discovery, in which the defendant admitted the agreement, was held not to preclude him from taking the objection that there was no note or memorandum to satisfy the Statute of Frauds. We have adverted to the authorities cited in Mr. Justice Blackburn's book, and to the case of *Rondeau v. Wyatt*; but we find no decided authority upon the point in judgment. In that state of the authorities, we are remitted to the Statute of Frauds itself: and, upon reference to its language, we think the defendant's letter does amount to a sufficient memorandum in writing, and makes the contract good. The purpose of the statute was, to prevent fraud and perjury. Now, the danger of perjury in this case is effectually prevented by the letter of the defendant; for, he distinctly admits that he made the contract, and at the price alleged. I do not consider that the defendant intended to deny his liability by reason of the absence or insufficiency of the contract: but that the only question which he intended to raise, was whether he or the plaintiffs should settle with the carriers for the damage done to the goods. I think that constitutes a material distinction between the present case and those cited, in which the defendant, admitting the contract, has rested his defence on the non-compliance with the statute. But, if there be no such distinction, and we are called upon to consider whether the doctrine suggested in my Brother Blackburn's book correctly represents the law upon this subject, with the highest respect for that clear-headed and highly eminent judge, I must say that I am unable to give my assent to his proposition (a). I think the purpose of the Statute of Frauds is answered by the defendant's letter, and that the plaintiffs are entitled to recover.

(a) In the case of *Buxton v. Rust*, L. R. 7 Ex., at p. 282, Mr. Justice Blackburn remarked with regard to the passage here commented upon: "I may add with reference to the statement read from Blackburn on the Contract of Sale, p. 66, to the effect that 'it seems difficult on principle to see how an admission of the terms of a bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good,' that the point has been clearly settled since the publication of that book by the decisions of the Court of Common Pleas, which have been referred to, and from which I do not see any reason to dissent; the rule they establish is as logical and more convenient than that suggested by myself." Ed.

WILLIAMS, J. I am entirely of the same opinion. It cannot for a moment be controverted here, that in point of fact there was a good and lawful contract between the plaintiffs and the defendant for the sale of the goods in question. But it is equally clear, that, as the price of the goods bargained for exceeded the value of 10%, the contract was not an actionable one unless the requisites of the 17th section of the Statute of Frauds were complied with; that section enacting, "that no contract for the sale of any goods, wares, and merchandizes for the price of 10% sterling or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same, or (2) give something in earnest to bind the bargain or in part of payment, or (3) that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The effect of that enactment is, that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, ex. gr., unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract. The question, therefore, in the present case, is, whether such a memorandum has come into existence. It is plain to my mind that the terms of the defendant's letter of the 3rd of December do constitute such a memorandum as the statute contemplated. It completely recites all the essential terms of the bargain: and the only question is whether it is the less a note or memorandum of the bargain, because it is accompanied by a statement that the defendant does not consider himself liable in law for the performance of it. There is nothing in the statute to warrant that. I think the statute is satisfied, and that the contract is an actionable contract. It is said that there may be a difficulty in maintaining this doctrine, in consequence of the inconvenience which may arise from the property not passing by the contract until it has become capable of being enforced by action. That may be true: but the same may be said as to part acceptance or the payment of earnest, and yet nobody ever suggested a doubt that an action might be brought upon a verbal contract where either of these things has taken place. I entirely agree with my Lord in his appreciation of my Brother Blackburn's book: but, after fully considering the proposition which has been cited from it, and the reasoning upon which that proposition is based, I feel bound to say that I do not consider it satisfactory. The right of the defendant to put an end to the contract, if any such right existed, ought not to affect the question whether there was a valid contract or not. There was a valid con-

tract, and the memorandum was a sufficient memorandum. The intention of the defendant to repudiate or abandon the contract cannot affect the question as to the sufficiency or insufficiency of it.

WILLES, J. I am of the same opinion. No doubt there was a contract between the plaintiffs and the defendant for the purchase of the goods in question by the latter, and, assuming it to be a good contract, the defendant would be bound to pay the price. At common law, it is clear that the plaintiffs would have a good cause of action : but it is insisted that no action can be maintained, by reason of the 17th section of the Statute of Frauds. I found my opinion in favor of the plaintiffs entirely upon the construction of that section ; for there is no authority on either side, except the passage quoted from my Brother Blackburn's book. It is impossible that anybody can attribute more weight than I do to any thing that falls from that learned judge : but, whatever distrust I may under the circumstances be disposed to entertain, I must still act upon my own opinion. Look at the words of the statute. They are, "no contract for the sale of any goods, &c., shall be allowed to be good except,—that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." It follows from these words, that, if there be any note or memorandum in writing of the bargain signed by the party to be charged, the contract is allowed to be good as at common law. Unquestionably there is in the present case a note or memorandum in writing ; and upon the true construction of the statute, I think, a sufficient note. The defendant in the letter says,—“I selected the goods for ready money ; and the price agreed on was 38*l.* 10*s.* 6*d.*” That clearly is a memorandum containing the terms of the bargain. It is urged that this letter was not a sufficient note or memorandum to satisfy the statute, because it is accompanied by a statement showing that the defendant did not wish to be bound by the contract. It seems to me that to hold that that circumstance is to operate to prevent the letter being such a memorandum as the statute contemplated, would be depriving the word “some,” or the correlative word “any” of its natural meaning and effect. The requisites of the statute have been complied with : and there is nothing in the statute to say that the note or memorandum is to be defeated by any collateral circumstances. Upon that simple ground, it seems to me that this contract stands good, and that the plaintiffs are entitled to recover.

KEATING, J. I am of the same opinion. No doubt the contract in this case was good if evidenced by writing. The object of the Statute of Frauds was, to provide the certainty of written evidence for the uncertainty of oral evidence of contracts. The defendant's letter of the 3rd of December does contain all the terms of the bargain between

these parties. It is said that that letter ceases to be a note or memorandum of the contract, because the defendant has thought fit to add to it an intimation that he does not wish or intend to be bound by it. It seems to me, however, that that statement cannot be allowed to vary the operation of the previous words of the letter, which amount to a clear acknowledgment of the terms of the bargain. I should not have entertained the slightest doubt upon the subject, but for the passage quoted from Mr. Justice Blackburn's book. But the learned author merely throws it out as an intimation of opinion, which he admits to have no authority or even dictum in its favor. For these reasons I concur with the rest of the court in thinking that the rule to enter a verdict for the plaintiffs for 38*l.* 10*s.* 6*d.* should be made absolute.

*Rule absolute accordingly.*

## CHAPTER V.

### CONSIDERATION.

#### SECTION I.—DESCRIPTION OF CONSIDERATION.\*

#### ELEANOR THOMAS *v.* BENJAMIN THOMAS.

IN THE QUEEN'S BENCH, FEBRUARY 5, 1842.

[*Reported in 2 Queen's Bench Reports*, 851.]

**ASSUMPSIT.** The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or other assurances, grants, &c., or otherwise, assure a certain dwelling-house and premises, in the county of Glamorgan, unto plaintiff for her life, or so long as she should continue a widow and unmarried; and that plaintiff should at all times during which she should have possession of the said dwelling-house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators, or assigns, the sum of 1*l.* yearly towards the ground-rent payable in respect to the said dwelling-house and other premises thereto adjoining, and keep the said dwelling-house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same; and that although plaintiff afterwards and before the commencement of the suit, to wit, &c., required of defendant to grant, &c., by a necessary and sufficient deed, &c., the said dwelling-house, &c., to plaintiff for her life, or while she continued a widow; and though she had then continued, &c., and still was, a widow and unmarried, and although she did, to wit, on, &c., tender to the defendant for his execution a certain necessary and sufficient deed, &c., proper and sufficient for the conveyance, &c., and although, &c., (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, &c.

Pleas: 1. Non assumpsit. 2. That there was not the consideration alleged in the declaration for the defendant's promise. 3. Fraud and covin. Issues thereon.

At the trial before Coltman, J., at the Glamorganshire Lent assizes,

\* Ch. III, Sect. II, Finch.

1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling-houses in Merthyr Tydvil, in one of which, being the dwelling-house in question, he was himself residing ; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, &c., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife : and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of 100*l*. instead thereof.

This declaration being shortly afterwards brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect ; and after the lapse of a few days they and the plaintiff executed the agreement declared upon, which, after stating the parties and briefly reciting the will, proceeded as follows :—

“ And whereas the said testator, shortly before his death declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house,” &c., or 100*l*. out of his personal estate,” in addition to the respective legacies and bequests given her in and by his said will ; “ but such declaration and desire was not reduced to writing in the lifetime of the said John Thomas and read over to him ; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect : Now these presents witness, and it is hereby agreed and declared by and between the parties, that in consideration of such desire and of the premises,” the executors would convey the dwelling-house, &c., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried : “ provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas or her assigns shall and will, at all times during which she shall have possession of the said dwelling-house, &c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, &c., the sum of 1*l*. yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair ;” with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises

for some time; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and shortly before the trial brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues; and in Easter term last a rule *nisi* was obtained pursuant to the leave reserved.

*Chilton* and *W. M. James* now showed cause. It is sufficient if there be any legal consideration for this agreement. [E. V. Williams conceded that, in a court of law, he could not go into the adequacy of the consideration, and that, if the consideration was in part a legal and in part only a moral one, the latter part need not be stated in the declaration (a).] The objection taken at the trial was, that the consideration for the agreement, instead of being that which is alleged in the declaration, was, as stated in the agreement itself, a respect for the testator's intentions, in which case this would be a mere voluntary agreement: the defendant now appears to contend that respect for the testator's intentions is a part of the legal consideration, and ought to have been set out. But it could not be so characterized. All that a plaintiff is required to do is to set out the legal effect of the contract and to show performance on the plaintiff's part: here she was in possession for three or four years paying rent, under an undertaking to pay rent and keep the premises in repair: that is a good consideration; and if so, it cannot be necessary in pleading it to allege additional motives, which in the eye of the law do not enter into the consideration. Thus, in debt for rent on a demise of a messuage with the furniture, though in fact the furniture forms an important item in estimating the rent, yet as in point of law the rent issues out of the real property, and not out of the furniture, it is sufficient to allege a demise of the real property. *Farewell v. Dickinson* (b). Parties are often influenced by motives which form no part of the legal consideration, such as the character of a tenant, or the merits or distresses of the party intended to be benefited; and the circumstance that such motives happen to be stated in the agreement cannot affect the legal rights of the parties, nor make it necessary to state those motives in the declaration.

*E. V. Williams*, contra. The consideration alleged in the declaration is solely the promise to pay rent and repair: therefore it lay on the plaintiff to prove that to have been the true and sole consideration. *Beech v. White* (c). But the evidence shows that the testator's decla-

(a) On this point *Chilton* cited Bul. N. P. 147, and 1 Chitt. Plead. 295, 300, 6th ed.

(b) 6 B. & C. 251.

(c) 12 A. & E. 668.

ration, as brought before and recognized by the executors, was part, if not the whole, of the consideration. It is conceded that where there is a good legal consideration conjoined with a moral one, it is not necessary to state both; but here regard for the testator's intentions was not, under the circumstances, a mere moral consideration; for the declaration had been made and reduced to writing so formally that it might well be thought valid in law, and so the agreement be made by the executors and residuary legatees to buy peace (*a*). If the testator's expressed wish was part or the whole of the consideration, the declaration should have so alleged it, and a nonsuit ought to be entered. But in fact, if it be not the consideration, there is no legal consideration at all: this is a mere gift *cum onere*; and had it been stated truly, the declaration would have been bad on general demurrer. [PATTERSON, J. The rent, if issuing out of the house, might follow the gift; but the obligation to repair does not.] The expressions in the agreement with reference to the ground-rent, and the evidence of one of the witnesses, show that the property was held under a superior landlord: the assignee's obligation to pay rent and repair would therefore be implied from the very nature and state of things which existed between the parties. Bayley, J., in *Burnett v. Lynch* (*b*). [LORD DENMAN, C. J. There is nothing to show who was liable to pay the ground-rent. COLERIDGE, J. The 1*l*. is reserved payable to the executors: it is quite different from an assignee's liability.] Still the annexing of such a payment cannot be regarded as the consideration. What is meant by the consideration for a promise, but the cause or inducement for making it? Plowden (*c*), commenting on *Sharrington v. Strotton* says, "Note: That by the civil law *nudum pactum* is defined thus: *Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.*" In Chitty on Contracts (*d*) the following passage is cited from the Code Civil: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet." The rent and repairs cannot be said to have been the cause or motive which induced the executors to make this agreement: it must have been such a belief as is recited in the agreement itself, which, though a good moral consideration, and perhaps sufficient to raise a use, is not sufficient to support a promise. The proviso merely causes the donee to take the gift charged with the burthen of paying the rent and keeping the premises in repair; and she cannot turn these conditions into a consideration. It is clear that if the proviso had not existed, the executors might have retracted at any moment; their right to do so cannot be qualified by the circum-

(*a*) See *Haigh v. Brooks*, 10 A. & E. 309, and *Brooks v. Haigh*, 10 A. & E. 323.

(*b*) 5 B. & C. 589, 605. See also the judgments of Holroyd, J., and Littledale, J. in the same case.

(*c*) Note to *Sharrington v. Strotton*, Plowd. 309

(*d*) P. 28, 3d ed. 1841. Code Civil, liv. 3, tit. 3, ch. 2, §§ 4 and 1131.



stance that the gift was *cum onere*; otherwise, when carried out to conveyance, it would be a conveyance on good, as distinguished from valuable, consideration. Suppose a subsequent sale; a purchaser for value would have been entitled, though he had purchased with notice of the gift. A consideration, to be sufficient against such a purchaser within the saving clause of the 27 Eliz. c. 4, s. 4 (a), must be such a consideration as would support an assumpsit. Were it otherwise, donees by voluntary gift would confirm their estates by covenanting to repair a monument, maintain a plantation, or the like. Here the donors in effect say, that the donee is to pay no purchase-money, but is to do what a purchaser for full consideration would have to do—pay the rent and maintain in repair. And it is to be observed that, in that part of the agreement where the purchase-money is usually mentioned, instead of any valuable consideration there is a mere reference to the testator's wishes; which is followed in a different part of the deed by a simple provision for the burthens commonly belonging to and incident to the subject-matter. The defendant is therefore entitled to a verdict on the first issue.

LORD DENMAN, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground-rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso). This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large: the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff (b). Now that which is suggested as the consideration here, a pious respect for the wishes of

(a) See Newland on Contracts, c. 24, p. 392, *et seq.*

(b) In the case of *Currie v. Misa*, L. R. 10 Ex. at p. 162, the following description of consideration is given by the Exchequer Chamber: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." ED.

the testator, does not in any way move from the plaintiff : it moves from the testator ; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift : but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens ; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house ; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs : these houses may very possibly be held under a lease containing covenants to repair ; but we know nothing about it : for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors ; and had the instrument been executed by the donors only, there might have been some ground for that construction ; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value : possibly that might be so : but suppose it would : the plaintiff contracts to take it, and does take it, whatever it is, for better for worse : perhaps a *bonâ fide* purchase for a valuable consideration might override it ; but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have in fact disposed of the case. It is conceded that mere motive need not be stated ; and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part : *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfill the intentions of the testator ; but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration : it is a valuable consideration : it is clearly a thing newly created, and not part of the old ground-rent.

*Rule discharged (a).*

(a) In a commentary on the Code Civil, in *Codes Français Expliqués, &c.*, by J. A. Rogron, Paris, 1836, the words of the Code, "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet" (*ante*, p. 366), are discussed ; and the note upon "sans cause" is as follows :

## SECTION II.—NECESSITY OF CONSIDERATION.\*

## PILLANS AND ROSE v. VAN MIEROP AND HOPKINS.

IN THE KING'S BENCH, APRIL 30, 1765.

*[Reported in 3 Burrow, 1663.]*

ON Friday 25th of January last, Mr. Attorney-General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence: the substance of which evidence was as follows:

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for 800*l.* payable to one Clifford; and proposed to give them credit upon a good house in London, for their reimbursement; or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London; as the condition of their accepting the bill. White names the house of the defendants, as this house of rank; and offers credit upon them. Whereupon the plaintiffs honored the draught, and paid the money; and then wrote to the defendants Van Mierop and Hopkins, merchants in London, (to whom White also wrote, about the same time,) desiring to know whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's and Hopkins's house here in London, for 800*l.* upon the credit of White: and they, having received their assent, accordingly drew upon the defendants. In the interim White failed before their draught came to hand, or was even drawn; and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them,

“La cause est ce qui détermine l'engagement que prend une partie dans un contrat; il ne faut pas la confondre avec la cause implicite du contrat, autrement le motif qui porte à contracter. La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure libéralité de la part de l'une des parties: ainsi, lorsque je m'oblige à payer mille francs à Paul, pour tels services que son père m'a rendus, la cause déterminante du contrat, ce sont les services qui m'ont été rendus; le motif qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son père; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause. Je m'oblige à donner mille francs à Paul pour qu'il suive une affaire pendante devant le tribunal de la Seine: la cause déterminante est la promesse de Paul qu'il suivra mon affaire; si elle est jugée irrévocablement au moment où nous avons stipulé, le contrat est sans cause. Autre exemple: je vous vends ma maison; la cause de la vente est, d'un côté, la maison elle-même, de l'autre, le prix. Enfin je donne, dans la forme de dispositions entre vifs, ma maison à Paul, qui l'accepte: ma libéralité est ici la seule cause du contrat.” P. 209.”

Which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon showing cause, on Monday 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs, and defendants, and White. The letters were read: 1st, those (a) from White and Co. in Ireland, to the plaintiffs in Holland; (by which it appeared that Pillans and Rose had then accepted the bills drawn upon them by White, payable to Clifford;) then those of the plaintiffs to the defendants; and also White's to the defendants; then those of the defendants to the plaintiffs (b) agreeing to honor their bill drawn on account of White; the letter from the defendants to the plaintiffs, informing them that White had stopped payment, and desiring them not to draw, as they could not accept their draught; and lastly that which the plaintiffs wrote to the defendants, that they should draw on them, holding them not to be at liberty to withdraw from their engagement.

The counsel for the defendants were Mr. Serjeant Davy and Mr. Wallace. They observed that the plaintiffs had given credit to White above a month before the defendants had agreed to accept their draught. For it appears by White's letter of 16th February, 1762, that Pillans and Rose had then actually accepted Clifford's bills: but Van Mierop and Hopkins did not agree to honor their draughts till 19th of March, 1762. Therefore the consideration was past and done, before their promise was made. And they argued, and principally insisted, that for one man to undertake to pay another man's debt, was a void undertaking unless there was some consideration for such undertaking: and that a mere general promise, without benefit to the promiser, or loss to the promisee, was a *nudum pactum*. And they cited 1 Bulstr. 120, *Thorner v. Field*. Dyer, 272, pl. 31, *Hunt v. Bate*. 2 Vern. 224, 225. *Cecil et al. v. Earl of Salisbury*. 1 Ro. Abr. 11, pl. 1, Letter Q. "Consideration executed." Yelv. 40, 41, and 2 Strange, 933. *Hayes v. Warren*; where a past consideration was holden insufficient to raise an *assumpsit* (c).

The counsel for the plaintiffs were Mr. Attorney-General, Mr. Walker and Mr. Dunning. They denied this to be a past consideration; and insisted that the liberty given to the plaintiffs, to draw upon a confirmed house in London, (which was prior to the undertaking by the defendants,) was the consideration of the credit given by the plaintiffs to White's draughts: and that this was a good and sufficient consideration for the undertaking made by the defendants. It relates back to the original transaction. If any one promises to pay for goods delivered to a third person; such promise, being in writing, is a good

(a) Dated 16th Feb. 1762. (b) Dated 19th March, 1762. (c) See likewise *Hardres*, 72, 73, 74.

one. And here White had had 800%. from the plaintiffs, upon this assurance: and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for White's reimbursing the plaintiffs. And a promise in writing is out of the statute.

This case does not fall within those that have been cited: for Van Mierop and Hopkins have made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable, and bound them. And they are obliged, both by law, and in honor and honesty, to perform it. It is a mercantile transaction; and it must be considered, upon the whole of it, as an admittance that the defendants either had or soon would have effects of White's in their hands.

LORD MANSFIELD. The objection is, that the letter whereby Van Mierop and Hopkins undertake to honor the plaintiff's bills, is *nudum pactum*. The other side deny it. This is the only question, here.

But this is quite different from what passed at the trial; the *nudum pactum* was not mentioned at that time. The grounds it was argued upon there, were: 1st, that this imported to be a credit given to Pillans and Rose, in prospect of a future credit to be given by them to White; and that this credit might well be countermanded before the advancement of any money; and this is so. 2dly, that there was a fraud: for that Van Mierop and Hopkins had reason to think that White had sent goods to Pillans and Rose; whereas, this was a mere lending of credit. 3dly, that if Pillans and Rose had received goods from White, and retained them till he failed, the defendant's undertaking was revocable.

I was then of opinion that Van Mierop and Hopkins were bound by their letter unless there was some fraud upon them: for that they had engaged under their hands, in a mercantile transaction, to give credit for Pillans and Rose's reimbursement. And I did not see it to be future, as had been objected; nor did I see any fraud. And nothing was then urged about its being *nudum pactum*. I have no idea that promises for the debt of another are applicable to the present case. This is, as Mr. Walker said, a mercantile transaction; and it depends upon these letters from merchant to merchant about honoring bills, to such an amount: and this credit is given upon a supposition that the person who is to draw upon the undertakers within a certain time has goods in his hands, or will have them. Here, Pillans and Rose trusted to this undertaking: and there is no fraud. Therefore it is quite upon another foundation than that of a naked promise from one, to pay the debt of another.

MR. JUSTICE WILMOT. I own, the want of consideration, at first,

occurred to me. But I now am satisfied, that this case has nothing to do with the cases of undertakings by one to pay the debt of another. In those cases it is settled, that where the consideration is past, the action will not lie: and yet this seems a hard case. The mere promise to pay the debt of another without any consideration at all, is *nudum pactum*: but the least spark of a consideration will be sufficient. It seems almost implied, that there must be some consideration: but if there be none at all it is *nudum pactum*. The statute must mean such a special promise as would have supported an action. But all this is out of the present case. So also, I think, is all the precedent correspondence. It lies in a narrow compass. White, Pillans and Rose, and Van Mierop and Hopkins had all a correspondence together: they have intercourse together, mutually in mercantile transactions. Pillans and Rose write to Van Mierop and Hopkins, to know whether they will honor their draughts for 800*l.* in about a month's time. They say, they will. Now it strikes me, as Mr. Walker said, that it admits that they either have assets or effects of White's in their hands, or that they have credit upon him. Now by this undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue White, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by Van Mierop and Hopkins: and they ought to be bound by it. Consequently, there ought to be a new trial.

LORD MANSFIELD. A letter of credit may be given as well for money already advanced, as for money to be advanced in future. Let it be argued again the next term: and you shall have the opinion of the whole court.

*Utterius Concilium.*

Yesterday, this matter accordingly came on again; and was argued by Mr. Wallace, for the defendants; and by the same counsel as argued last term for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from White to the defendants; not from the plaintiffs Pillans and Rose, to the defendants: and as the defendants have undertaken for White, they can't revoke or retract their engagement. This case is not like the cases cited: some of which are strange cases and not founded on solid or sufficient reasons; and in others of them there was no meritorious consideration at all. And Mr. Walker cited Hardres, 71, *Reynolds v. Prosser*; where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir Thomas Hardres, and all the cases cited by him. That was an assumpsit by a stranger, in consideration that the plaintiff would forbear to prosecute Lord Abergavenny upon a judgment, in the name of the original

plaintiff, by virtue of a letter of attorney to receive it to his own use.

Serjeant Davy was heard, this morning, on behalf of the defendants ; and urged that the plaintiffs gave credit to White, upon his promising to reimburse them : and he said, there was a fraudulent concealment of facts. White's first letter could have no influence on the plaintiffs. For they afterwards desired a confirmed credit upon a house of rank in London : so that they did not rely on White's first letter which offered credit on the defendants, or any other method of reimbursement. And nothing had then passed between White and the defendants. For the first letter between them was on the 16th of February (a fortnight after) : and then the defendants were deceived into a false opinion that it was for a future credit, and not to secure a past acceptance of White's bills by the plaintiffs. And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800*l.* of White's, a fortnight before the defendant's letter of 16th February : which bill the plaintiffs had accepted upon assurance of credit on a house in London, to reimburse them. And this transaction was fraudulently concealed, both by White and the plaintiffs, from the defendants. If this had been disclosed, the defendants would have plainly seen that the plaintiffs doubted of White's sufficiency ; by their requiring further security for his already contracted debt. All letters of credit relate to future credit ; not to debts before incurred : nor can the advancer of money thereupon include an old debt before incurred. A bill cannot be accepted before it is drawn. This is only a promise to accept ; for it is only a promise to honor the bill ; not a promise to pay it. A promise to pay a past debt of another person is void at common law, for want of consideration ; unless there be at least an implied promise from the debtee to forbear suing the original debtor. But here was a debt clearly contracted by White with the plaintiffs on the credit of White : and there is no promise from the plaintiffs to forbear suing White. A naked promise is a void promise : the consideration must be executory, not passed or executed.

Lord Mansfield asked, if any case could be found, where the undertaking holden to be a *nudum pactum* was in writing.

Serjeant Davy. It was anciently doubted whether a written acceptance of a bill of exchange was binding, for want of a consideration. It is so said, somewhere in Lutwyche.

LORD MANSFIELD. This is a matter of great consequence to trade and commerce, in every light. If there was any kind of fraud in this transaction, the collusion and *mala fides* would have vacated the contract. But from these letters, it seems to me clear, that there was none. The first proposal from White, was to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop : this was

the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop and company. They answered that they would honor the plaintiffs' draughts. So that the defendants assent to the proposal made by White, and ratify it. And it does not seem at all, that the plaintiffs then doubted of White's sufficiency, or meant to conceal anything from the defendants. If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same: A witness cannot be admitted, to prove the law of merchants. We must consider it as a point of law. A *nudum pactum* does not exist, in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds, &c. (a), there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle. In commercial cases amongst merchants, the want of consideration is not an objection.

This is just the same thing as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs: it had been nothing to the plaintiffs, whether Van Mierop and Co. had effects of White's in their hands, or not; if they had accepted his bill. And this amounts to the same thing:—I will give the bill due honor, is, in effect, accepting it. If a man agrees that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement to accept the bill, if there was a necessity to accept it; and to pay it, when due: and they could not afterwards retract. It would be very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of *nudum pactum* mentioned to the jury; nor was it, I dare say, at all in their idea or contemplation. I think the point of law is with the plaintiffs.

MR. JUSTICE WILMOT. The question is, whether this action can be supported, upon the breach of this agreement. I can find none of those cases that go upon its being *nudum pactum*, that are in writing: they are all upon parol. I have traced this matter of the *nudum pactum*: and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*; and how the notion of a *nudum pactum* first came into our law. He said, it was echoed from the civil law: *Ex nudo pacto non oritur actio*. Vinnius gives the reason, in lib. 3, tit. *De Obligationibus*, 4to edition, 596. If by stipulation, (and *à fortiori*, if by writing), it was good without consideration. There was no radical defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection,

(a) *Vide* 3 Burr. 1639. It is there said that "a man may without consideration enter into an express covenant under hand and seal." ED.



and to prevent obscurity and uncertainty : and in that view either writing or certain formalities were required. *Idem*, on Justinian, 4to edit., 614.

Therefore it was intended as a guard against rash, inconsiderate declarations : but if an undertaking was entered into upon deliberation and reflection, it had activity ; and such promises were binding. Both Grotius and Puffendorff, hold them obligatory by the law of nations. Grot., lib. 2, c. 11, *De Promissis*. Puffend. lib. 3, c. 5. They are morally good ; and only require ascertainment. Therefore there is no reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the Roman law ; because here is both stipulation (in the express Roman form) and writing. Bracton (who wrote (a) *temp.* Hen. 3,) is the first of our lawyers who mention this. His writings interweave a great many things out of the Roman law. In his third book cap. 1, *De Actionibus*, he distinguishes between naked and clothed contracts. He says that *obligatio est mater actionis* ; and that it may arise *ex contractu, multis modis ; sicut ex conventionione, &c. ; sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, &c., &c.*

Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308. b. (b) in the case of *Sheryngton and Pledal v. Strotton and others*, mentions it ; and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base), and contracts or agreements in writing (which are more high) ; and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said. Words pass from men lightly : but where the agreement is made by deed, there is more stay ; &c., &c. For, first, there is, &c., &c. ; and thirdly, he delivers the writing as his deed, the delivery of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed, to the other. And therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration. The voidness of the consideration is the same, in reality, in both cases : the reason of adopting the rule was the same, in both cases ; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise. Therefore, if it stood only upon the naked promise, its being, in this case, reduced into writing, is a sufficient guard against surprise : and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find that a *nudum pactum* evidenced by writing has been

(a) Sub ultima tempora Regis H. 3.

(b) This probably was Plowden's own argument. I suppose he was himself that apprentice of the Middle Temple who argued for the defendants.

ever holden bad: and I should think it good; though, where it is merely verbal, it is bad. Yet I give no opinion upon its being good, always, when in writing. Many of the old cases are strange and absurd: so also are some of the modern ones; particularly, that of *Hayes v. Warren* (a). It is now settled, that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon. In another instance, the strictness has been relaxed: As for instance, burying (b) a son; or curing (c) a son; the considerations were both past; and yet holden good. It has been melting down into common sense, of late times.

However, I do here see a consideration. If it be a departure from any right, it will be sufficient to graft a verbal promise upon. Now here, White, living in Ireland, writes to the plaintiffs to honor his draught for 800*l.* (d) payable ten weeks after. The plaintiffs agree to it, on condition that they be made safe at all events. White offers good credit on a house in London; and draws: and the plaintiffs accept his draught. Then White writes to them, to draw on Van Mierop and Hopkins; to whom the plaintiffs write, to inquire if they will honor their draught: they engage that they will. This transaction has prevented, stopped, and disabled the plaintiffs from calling upon White, for the performance of his engagement. For, White's engagement is complied with: so that the plaintiffs could not call upon him for his security. I do not speak of the money: for that was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon White for a performance of his engagement to give them credit on a good house in London, for reimbursement: so that here is a good consideration. The law does not weigh the *quantum* of the consideration. The suspension of the plaintiff's right to call upon White for a compliance with his engagement is sufficient to support an action; even if it be a suspension of the right, for a day only, or for ever so little a time.

But to consider this as a commercial case. All nations ought to have their laws conformable to each other, in such cases. '*Fides servanda est: simplicitas juris gentium prævaleat. Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed, as a rule. On a question of this nature, whether by the law of nations, such an engagement as this shall bind, the law is to judge.

The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having, or being supposed

(a) *Vide* 2 Sir J. S. 933. I have a very full note of this case. The reason of the reversal of the judgment was, that it did not appear by the declaration to be either for the benefit or at the request of the defendant.

(b) Church and Church's Case, cited in Raym. 280. (c) *Vide* 2 Leon. 111.

(d) For between Ireland and Holland each usance is one month.

to have, effects in hand; but for the convenience of trade and commerce. *Fides est servanda*. An acceptance for the honor of the drawer shall bind the acceptor; so shall a verbal acceptance. And whether this be an actual acceptance, or an agreement to accept, it ought equally to bind. An agreement to accept a bill to be drawn in future would (as it seems to me) by connection and relation, bind, on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill: agreeing to honor it is agreeing to pay it. I see no sort of fraud. It rather seems as if the defendants had effects of White's in their hands. And it does not appear to me, that the defendants would not have honored the plaintiffs' draughts, even though they had known that it was future credit. But whether the plaintiffs or the defendants had effects of White's in their hands, or not; we must determine on the general doctrine. And I am of opinion, that there ought to be a new trial.

MR. JUSTICE YATES was of the same opinion. He said it was a case of great consequence to commerce: and therefore he would give both his opinion and his reasons. The arguments on the side of the defendants terminate in its being a *nudum pactum*, and therefore void. This depends upon two questions. 1st question,—whether this be a promise without a consideration; 2d question,—if it is, then, whether this promise shall not be binding, of itself, without any consideration.

First,—the draught drawn by White on the plaintiffs, payable to Clifford, is no part of the consideration of the undertaking by the defendants. The draught payable to Clifford is never mentioned to the defendants. They are asked whether they will answer a draught from the plaintiffs upon them: they answer they will honor such a draught on them. Whether the defendants had or had not effects of White's in their hands, is immaterial. Any damage (*a*) to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking. Now here the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would not rely on White's assurance only, but wrote to the defendants to know if they would accept their draughts. The credit of the plaintiffs might have been hurt by the refusal of the defendants to accept White's bills. They were, or might have been, prevented from resorting to him, or getting further security from him. It comes within the cases of promises where the debtor forbears suing the original debtor.

Second question,—Whether, by the law of merchants, this contract

(a) *Vide Coggs v. Bernard*, 2 Lord Raym. 919.

is not binding on the defendants, though it was without consideration. The acceptance of a bill of exchange is an obligation to pay it. The end of their institution, their currency, requires that it should be so. On this principle, bills of exchange are considered and are declared upon as special contracts, though legally they are only simple contracts. The declaration sets forth the bill and acceptance specifically, and that thereby the defendants, by the custom of merchants, became liable to pay it. This agreement to honor their bill was a virtual acceptance of the bill. An acceptance needs not be upon the bill itself: it may be by collateral writing. *Wilkinson v. Lutwidge*, 1 Strange, 648. A promise to accept is the same as an actual acceptance, and a small matter amounts to an acceptance; and so says Molloy, lib. 2, c. 10, § 20. And an acceptance will bind, though the acceptor has no effects of the drawer in his hands, and without any consideration. *Symons v. Parminter* (a) Hil. 1747, 21 G. 2, B. R. And a bill accepted for the honor of the drawer will also bind.

Then he applied these positions to the present case. It was an acceptance of this very draught by relation and connection, though the bill was not then drawn by the plaintiffs on the defendants. But even if it did not amount to an actual acceptance, yet it would equally bind the defendants; they would be equally obliged to perform the effect of their undertaking. The plaintiffs apprised the defendants of their intention to draw, and the defendants promised to honor their draught; and the plaintiffs of course would regulate their conduct accordingly. Therefore, upon the whole circumstances of this transaction: 1st, There is a consideration; and, 2d, If there was none, yet in this commercial case the defendants would be bound.

Mr. JUSTICE ASTON. I am of opinion that there ought to be a new trial. If there be such a custom of merchants as has been alleged, it may be found by a jury; but it is the court, not the jury, who are to determine the law. This must be considered as a commercial transaction, and is a plain case. The defendants have undertaken to honor the plaintiffs' draught; therefore they are bound to pay it. This cannot be called a *nudum pactum*. The answer returned by the defendants is an admission of having effects of White's in their hands, if that were necessary. And after this promise to accept (which is an implied acceptance), they might have applied anything of White's that they had in their hands to this engagement, even though White had drawn other bills upon them in the interim. The defendants voluntarily engaged to the plaintiffs, and they could not recede from their engagement. As to its being a *nudum pactum* (which matter has been already so well explained), if there be turpitude or illegality in the

(a) This was on a motion in arrest of judgment. The judgment was affirmed (*ex parte*) in Dom. Proc. with £100 costs, upon or soon after 20th Feb. 1748.

consideration of a note, it will make it void, and may be given in evidence. But here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, whether they would accept: and their answer, that they would. Upon the whole he concurred, that an action will lay for the plaintiffs against them; and that the plaintiffs ought to recover.

By the COURT unanimously the rule to set aside the verdict, and for a new trial, was made absolute.

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RANN AND ANOTHER, *Executors of* MARY HUGHES, v. ISABELLA HUGHES, *Administratrix of* J. HUGHES.

IN THE HOUSE OF LORDS, MAY 14, 1778.

[Reported in 7 Term Reports, 350, note (a).]

THE declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiff's testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiff's testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death, the said sum of 983*l.* was unpaid: by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum; and being so liable, she, in consideration thereof, undertook and promised to pay, &c. The defendant pleaded *non assumpsit*, *plene administravit*, and *plene administravit* except as to certain goods, &c., which were not sufficient to pay an outstanding bond-debt of the intestate's therein set forth, &c. The replication took issue on these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor; Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity; upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor

affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum*, *ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested; and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be coëxtensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that, if it were necessary to support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed, upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of *Pillans v. Van Mierop and Hopkins*, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case: the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or

some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierop*, in Burr., and the case of *Losh v. Williamson*, Mich. 16 G. 3, in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.

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### SECTION III.—ADEQUACY OF CONSIDERATION.\*

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#### SIR ANTHONY STURLYN *v.* ALBANY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587.

[Reported in *Croke Elizabeth*, 67.]

**ASSUMPSIT.** The case was, the plaintiff had made a lease to J. S. of land for life, rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff allegeth that upon such a day of, &c., at Warwick, he showed unto him the indenture of lease by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, that there was no consideration to ground an action: for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed as for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff; for when

\* Ch. III, Sect. III, Finch.

a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the showing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages. But they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

*Nota.* In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c., that no action lieth upon this assumpsit; which was affirmed by the justices.

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BRET v. J. S. AND WIFE.

IN THE COMMON PLEAS, EASTER TERM, 1600.

[Reported in *Croke Elizabeth*, 756.]

**ASSUMPSIT.** The case was, that William Dracot, first husband to the *feme*, sent his son to table with the plaintiff for three years, and agreed to give unto him for every year 8*l.*, and died within the year. The *feme*, during her widowhood, in consideration of her natural affection to the son, and in consideration that the son should continue during the residue of the time with the plaintiff, promised to the plaintiff to pay unto him 6*l.* 13*s.* 4*d.* for the tabling of the son for the time past, and 8*l.* for every year after that he should continue there with the plaintiff. Afterwards she married the defendant, and the plaintiff brought his action as well for the 6*l.* 13*s.* 4*d.* as for the tabling for the two years following.

*Warburton* moved, that this action lay not. First, because it was an entire contract by her first husband for the entire year, which cannot be apportioned. Secondly, because natural affection is not sufficient to ground an assumpsit without *quid pro quo*. Thirdly, that this is a contract for which action of debt lies, and not this action.

But all the COURT held, that it well lay. For as to the first, it is well apportionable; because, being for tabling which he had taken, there ought to be a recompense, although he departed within the year, or that the contractor died within the year. To the second, they agreed that natural affection of itself is not a sufficient consideration to ground an assumpsit; for although it be sufficient to raise a use, yet it is not sufficient to ground an action, without an express *quid pro quo*. But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become



due. And as to the third, true it is that if the contract had been only for the tabling afterwards, then debt would have lain, and not this action; but in regard it is conjoined with another thing for which he could not have an action of debt (as it is here for this 6*l.* 13*s.* 4*d.* ), an action upon the case lies for all (as debt with other things may be put into an arbitrament). Wherefore it was adjudged for the plaintiff.

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BAINBRIDGE v. FIRMSTONE.

IN THE QUEEN'S BENCH, NOVEMBER 2, 1838.

[*Reported in 8 Adolphus & Ellis, 743.*]

**ASSUMPSIT.** The declaration stated that, whereas heretofore, to wit &c., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit two, boilers of the plaintiff, of great value, &c., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition, and as fit for use by plaintiff, as the same were in at the time of the consent so given by plaintiff; and that, although in pursuance of the consent so given, defendant, to wit on, &c., did weigh the same boilers, yet defendant did not nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, &c., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterwards, to wit on, &c., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, &c. Plea, Non assumpsit.

On the trial before Lord Denman, C. J., at the London sittings after last Trinity term, a verdict was found for the defendant.

*John Bayley* now moved in arrest of judgment. The declaration shows no consideration. There should have been either detriment to the plaintiff, or benefit to the defendant; 1 Selwyn's N. P. 45 (a). It does not appear that the defendant was to receive any remuneration. Besides, the word "weigh" is ambiguous.

**LORD DENMAN, C. J.** It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not enquire what benefit he expected to derive. The plaintiff might have given or refused leave.

(a) 9th ed.

PATTESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

Williams and Coleridge, JJ., concurred.

*Rule refused.*

## BOLTON v. MADDEN.

IN THE QUEEN'S BENCH, NOVEMBER 25, 1873.

[*Reported in Law Reports, 9 Queen's Bench, 55.*]

DECLARATION for money paid by the plaintiff for the defendant at his request. Plea, never indebted. Issue thereon.

At the trial of the Lord Mayor's Court, before the Common Serjeant, the judge ordered a nonsuit, with leave to the plaintiff to move to enter a verdict for 7*l.* 7*s.*

A rule was afterwards obtained accordingly on the ground that the Common Serjeant had ruled that the facts proved constituted only an imperfect obligation and did not amount to a legally binding contract.

The facts of the case, the course of the trial, and the arguments sufficiently appear in the judgment of the Court.

Nov. 20. *Templeton* showed cause.

*F. Turner* in support of the rule.

The following cases were cited: *Blachford v. Preston* (a); *Haigh v. Brooks* (b); *Bainbridge v. Firmstone* (c); *Shadwell v. Shadwell* (d); *Sterry v. Clifton* (e).

*Cur. adv. vult.*

Nov. 25. The judgment of the Court (Blackburn, Mellor, and Quain, JJ., was delivered by

BLACKBURN, J. In this case, tried in the Lord Mayor's Court, the plaintiff was nonsuited, but the jury, under the direction of the Common Serjeant, assessed the damages at 7*l.* 7*s.*, and leave was given to the plaintiff to move to enter a verdict for that amount; the pleadings to be amended if necessary.

From the notes, it appears that there was no dispute as to the facts. The plaintiff and defendant were both subscribers to a charity, the objects of which are elected by the subscribers who have votes pro-

(a) 8 T. R. 89.

(b) 10 Ad. & E. 309.

(c) 8 Ad. & E. 743.

(d) 9 C. B. (N.S.) 159; 30 L. J. (C. P.) 145

(e) 9 C. B. 110.

portioned in number to the amount they have subscribed. The plaintiff and defendant expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favored, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favor. The plaintiff performed his part of this agreement, and voted for the candidate favored by the defendant; but the defendant made default, and did not furnish any votes for the candidate favored by the plaintiff at the next election. The plaintiff in consequence subscribed 77. 7s. to the charity so as to obtain twenty-eight more votes in his own right, which he used in lieu of those which the defendant had promised to supply him.

There can be no doubt that there was an express promise by the defendant and a breach of that promise; but the doubt raised was, whether the consideration was such as to make that promise enforceable at law.

The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is "either for the benefit of the defendant or to the trouble or prejudice of the plaintiff:" see Com. Dig. Action on the Case in Assumpsit, B. 1. If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.

The argument for the defendant was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy.

But though some of us, at least, much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power.

We think, therefore, the nonsuit cannot be supported, and as there was evidence justifying the jury in assessing the damages as they have done, the rule must be made absolute to enter the verdict for the plaintiff.

*Rule absolute.*

## HAIGH AND ANOTHER v. BROOKS.

IN THE QUEEN'S BENCH, JUNE 6, 1839.

## BROOKS v. HAIGH AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JUNE 29, 1840.

*[Reported in 10 Adolphus & Ellis, 309, 323.]*

**ASSUMPSIT.** The first count of the declaration stated that heretofore, to wit on, &c., "in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guarantee of £10,000 on behalf of Messrs. John Lees and Sons, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees and Sons, paid at maturity; that is to say, a certain bill of exchange" bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees and Sons, payable three months after date, for £3466 13s. 7d., and made payable at, &c.: and also a certain other bill, &c.: describing two other bills for £3000 and £3200 drawn by plaintiffs upon and accepted by Lees and Sons, and made payable at, &c.: Averment, that plaintiffs, relying on defendant's said promise, did then to wit on, &c., "give up to the said defendant the said guaranty of £10,000." Breach, non-payment of the bills, when they afterwards came to maturity, by Lees and Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea, to the first count: "That the said supposed guaranty of £10,000, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guaranty was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit the said Messrs. John Lees and Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guaranty or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guaranty or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guaranty, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say:

MANCHESTER, 4th February, 1837.

MESSRS. HAIGH &amp; FRANCEYS.

GENT.,—In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of £10,000 for the purchase of cotton, I do hereby give you my guaranty for that amount (say £10,000), on their behalf.

JOHN BROOKS.

And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guaranty or special promise: wherefore the said defendant says that the supposed guaranty, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and therefore that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

Demurrer, assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guaranty in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said plaintiffs, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder. The demurrer was argued in last Hilary term (*a*).

Sir *W. W. Follett* for the plaintiffs. The undertaking declared upon is, on the face of it, sufficient to satisfy the Statute of Frauds, 29 Car. 2, c. 3, § 4. It is said, however, that the consideration is really insufficient, because the guarantee delivered up was one which could not have been sued upon consistently with the statute. But, assuming that to be so, a promise in consideration of delivering up such a guaranty might still be good. The defendant might, for substantial reasons, wish to have the guaranty back. His mercantile character was pledged by it. It might, on various other accounts, be important to him that such a paper should not remain in the plaintiff's hands; and, if the bargain was made upon any consideration, the Court will not inquire into its adequacy. This principle was lately recognized in *Hitchcock v. Coker* (*b*). Such a promise might be made in consideration of delivering up a letter; no one but the defendant might be able to judge how far the possession of it was valuable; but, if the letter was given up at his request, the rule would apply, that any thing so given, to the plaintiff's detriment, or the benefit of the defendant, is consideration for an assumpsit. Suppose the undertaking given up had been one rendered unavailing by the Statute of Limitations, no

(*a*) January 18th. Before Lord Denman, C. J.; Littledale, Williams, and Coleridge, JJ.  
 (*b*) 6 A. & E. 438. And see *Archer v. Marsh*, 6 A. & E. 959.

action would have lain upon it, but the attempt to enforce it could not perhaps have been resisted without injury to the defendant's mercantile character; the relinquishment of it, therefore, would have been good consideration for a promise. The present is a similar case. Release from a moral obligation is consideration enough for an express promise. If it were necessary that something should be foregone to which there was a legal right, the delivery of the mere written paper, which contained the first guaranty, was sufficient in this case. The plaintiffs are entitled to put some value on the possession of such a paper, though not legally available; as they might on the possession of a cancelled bond, or bills accepted by the defendant on wrong stamps. It is not, indeed, clear in this case that the first guaranty was void. In *Boehm v. Campbell* (a) a similar guaranty was held to show a sufficient consideration, though the advance for which the security was given had been already made, and it did not appear more distinctly than in the present case that time was to be granted. Supposing it even questionable whether the former undertaking bound the defendant, yet the discharge from a claim, or waiver of a defence, on which the promisee might or might not have been legally entitled to succeed, is consideration enough to support an assumpsit; *Longridge v. Dorville* (b), *Stracy v. The Bank of England* (c). Here, however, it appears, at all events, that the original guaranty may have been given under circumstances which rendered it morally binding; and that brings it within the principle of *Lee v. Muggeridge* (d) and other cases in which promises supported by moral obligation have been held sufficient.

Sir J. Campbell, Attorney General, *contra*. First, the original guaranty was void; and, if so, then, secondly, the promise declared upon is without consideration. . . . Secondly, the guaranty being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guaranty had been given in the words of the first. A consideration, to support a promise, must have some value in point of law; *Smith and Smith's Case* (e), and other authorities cited in note (b) to *Barber v. Fox* (f). *Rann v. Hughes* (g) illustrates the same point. A man may have in his possession a letter of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, the case is different: that was so in *Longridge v. Dorville* and

(a) 3 B. Moore, 15; s. c. 8 Taunt. 679. (b) 5 B. & Ald. 117. (c) 6 Bing. 754.

(d) 5 Taunt. 36.

(e) 3 Leon. 88.

(f) 2 Wms. Saund. 137 e. 5th edit. See *Jones v. White*, 5 New Ca. 341.

(g) Note (a) to *Mitchinson v. Hewson*, 7 T. R. 350.

*Stracy v. The Bank of England*. In *Shortrede v. Cheek* (a) the consideration disclosed was, that the plaintiff should withdraw a promissory note, on which he had an unquestioned right of action : and Parke, J. said, "There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration." It is argued that foregoing a security upon which the Statute of Limitations had attached would be a consideration ; but there an action would lie on the security if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp would be a consideration or not may be questionable ; but the objection is not one of which the Court would take judicial notice : here the Court must take notice that the guaranty is invalid. It is contended here that the promise is binding, because grounded on a moral obligation ; but that obligation rests on a promise which is itself not binding ; the new engagement, then, cannot have more force than the original one. In the cases where a moral obligation has been held sufficient ground for an express promise, the obligation has been something more than a *nudum pactum* : thus, in *Lee v. Muggeridge* money had been advanced by the plaintiff at the request of the promisor. But the doctrine, that a moral obligation is sufficient consideration for a subsequent promise, is not free from doubt. Lord Tenterden said, in *Littlefield v. Shee* (b), that it must be "received with some limitation." The instances which have been considered as establishing that doctrine are brought together in note (a) to *Wennall v. Adney* (c), and seem to resolve themselves into these classes. First, where there has been a legal obligation antecedent to the promise ; as the duty of overseers to provide for the poor. Secondly, where there was an antecedent equitable liability, as that of an executor to pay legacies ; but the doctrine, as applicable to these cases, appears to have been overruled. Thirdly, where a debt existed before the promise, but the remedy was barred by statute ; as in the cases of certificated bankrupts or discharged insolvents ; or where the Statute of Limitations has attached : in these instances the party indebted may waive the statutory bar and oblige himself, by a promise, to pay the debt. Fourthly, where a promise merely voidable has been ratified ; as in the case of a person of full age promising to pay a debt contracted during his infancy (d). In all these cases, so far as the doctrine is established, there has been an actual benefit received, or a debt, or other ground of legal obligation, antecedent to the promise relied upon : not merely a *nudum pactum*, as in the present instance, where the party originally promising had received no benefit, nor had the plaintiffs incurred any loss or prejudice at his request. The money had been advanced when the guaranty was given ; then the defendant

(a) 1 A. & E. 57. See *Wilkinson v. Byers*, 1 A. & E. 106.

(b) 2 B. & Ad. 811. (c) 3 Bos. & P. 249. (d) See *Meyer v. Haworth*, 8 A. & E. 467.

says, "Forego the guaranty, and I will see you paid." The prior moral obligation was only that which every man is under to keep his word. *Nash v. Brown* (a) *Holliday v. Atkinson* (b), and *Bret v. J. S. and his wife* (c) cited in note (b) to *Barber v. Fox*, all show that moral considerations, where no actual benefit has been received by one party, or prejudice sustained by the other, and no legal duty has attached, are not sufficient ground for an assumpsit. As to the delivery, in this case, of the mere paper, it is not pretended that the paper had any value: the contract of guaranty, not the paper containing it, was the object really in question.

Sir *W. W. Follett* in reply. . . . If it was only doubtful whether such a guaranty was not available, the giving it up was a good consideration. If the invalidity of it was not a point as clear as that the eldest son inherits, the Court will not measure the degree of doubt. It has scarcely been disputed that the giving up of bills drawn on wrong stamps, or a contract on which the Statute of Limitations had attached, would be sufficient consideration: but those cases do not essentially differ from the present. The bills are void from the first, and cannot be made valid; though the promisor may have good reason for wishing to get them into his possession. It is suggested that the bar created by the Statute of Limitations may be waived; but so also may that under the Statute of Frauds. It is clear that, to support a promise of this kind, there need not have been an original liability in the promisor; for that is not so in the case of the bills, or in that of the contract made during infancy. That a promise may be founded on sufficient consideration, though no benefit has accrued to the promisor, appears from *Stevens v. Lynch* (d), where the drawer of a bill, knowing that time had been given to the acceptor, undertook to pay on the acceptor's default, and an action was held maintainable on that undertaking. But, supposing the guaranty in this case to have been totally void, the giving up of a paper on which no action would lie may be sufficient consideration for a promise. Here the plaintiffs, though not entitled to recover on the guaranty, might have brought trover for the document if unlawfully taken out of their hands. In considering whether or not such an action would lie, the value would be of no importance; it is enough for the present argument, if the plaintiffs could have recovered a shilling. Suppose the defendant had said, "If you will not bring trover, I will pay the bills;" an action would clearly have lain on such an agreement, and the case would not have differed from the present. The consideration here is, not the releasing of an action on the guaranty, but the giving it up; whatever its value may have been, the bargain is binding. [COLERIDGE, J. It is decided in *Scott v. Jones* (e) that trover lies for an unstamped docu-

(a) Chitty on Bills, 74, note (x), 9th edit. (1840), by Chitty & Hulme.

(b) 5 B. & C. 501. (c) Cro. Eliz. 756. (d) 12 East, 38. (e) 4 Taunt. 865.



ment if it is capable of being made good by stamping.] Any paper may be the subject of an action of trover.

*Cur. adv. vult.*

LORD DENMAN, C. J., in this term (June 6th), delivered the judgment of the Court.

This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guaranty of £10,000 due from the acceptor to the plaintiffs. Plea, that the guaranty was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guaranty were binding in law or not. The form of the guaranty was set out in the plea. "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of £10,000 for the purchase of cotton, I do hereby give you my guaranty for that amount (say £10,000), on their behalf. John Brooks."

It was argued for the defendant that this guaranty is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guaranty, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import (a). As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable: while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guaranty could have been available within the doctrine of *Wain v. Warlters* (b), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of

(a) See the discussion on the words "for giving his vote," in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

(b) 5 East, 10.

that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We therefore think the plea bad: and the demurrer must prevail.

*Judgment for the plaintiffs.*

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber.

The writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity vacation, June 22d, 1840, before LORD ABINGER, C. B., BOSANQUET, COLTMAN and MAULE, JJ., and ALDERSON and ROLFE, BB.

Sir *J. Campbell*, Attorney-General, for the plaintiff in error. . . . No action would have lain on this guaranty; and if so, is the giving it up sufficient consideration for a new promise? Such an act is no consideration, unless the thing given up be of some merchantable value. Thus in Com. Dig., Action upon the Case upon Assumpsit (F. 8), (cited by Holroyd, J., in *Longridge v. Dorville*), it is said that the action does not lie upon a promise "in consideration of a surrender of a lease at will; for the lessor might determine it." There is indeed a qualification added: "unless there was a doubt whether it was a lease at will or for years;" but even then, unless the doubt were a very reasonable and well-grounded one, the action would fail. In *Smith and Smith's Case* the alleged consideration for an assumpsit was, that the promisee "would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children," to the defendant; and this was held not sufficient, the consideration being only to have the disposition of the goods for the benefit of the children, and not for the defendant's profit. There must be some advantage to the promisor, or detriment incurred by the promisee at his request. [MAULE, J. It need not be pecuniary. LORD ABINGER, C. B. In *Smith and Smith's Case* the suggestion in support of the consideration was, that the defendant was to reap a pecuniary advantage, which the court would not presume, because his doing so would have been a breach of trust.] The advantage must be such as can be appreciated in a court of law. There are many cases in which promises, in consideration of forbearance to sue, have been held void where there was

no suit that could have been forborne. *Tooley v. Windham* (a) ; *Barber v. Fox* ; *Loyd v. Lee* (b). It is true that the giving up a doubtful point of law has been held a good consideration, as in *Longridge v. Dorville* ; and it may be so where a reasonable doubt exists ; but in this case there could be no doubt on the invalidity of the first guaranty. [ALDERSON, B. What is the ground on which the giving up a doubtful point of law is a consideration ? To whom must it be doubtful ? The court which decides upon the assumpsit must be supposed capable of deciding the point of law.] There is a degree of uncertainty which the courts will notice. [MAULE, J., referred to *Jones v. Randall*.(c)] In *Stracy v. The Bank of England*, the point which might have been litigated was one of great nicety and difficulty. Tindal, C. J., in his judgment, so describes it. The argument on moral obligation can apply only to the first guaranty ; the terms of the declaration do not admit of its being extended to the second. And on the first guaranty no consideration appears, except the general obligation to perform a promise.

The Court below, in their judgment, argue that the words “ in consideration of your being in advance ” might mean “ on condition of your being in advance,” and suggest, as rendering this probable, that the plaintiffs must have come under the advance at the defendant's request, a supposition not confirmed by anything which appears on the record ; and they ground upon it the observation : “ Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty ; and if that be so, we have no concern with the adequacy or inadequacy of the price.” They also say : “ Whether or not the guaranty could have been available within the doctrine of *Wain v. Warlters*, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise.” [MAULE, J. The record does not show that any document was in the plaintiffs' possession. “ Giving up ” the guaranty might be merely relinquishing the contract. ALDERSON, B. If they held a written guaranty, it might have been given up by cancelling merely.] The court below argue that the defendant cannot be justified in breaking his promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it. “ It cannot be ascertained,” they say, “ that that value was what he most regarded. He may have had other objects and motives ; and of their weight he was the only judge.” But this reasoning would support a promise even in such a case as *Barber v. Fox*. The plaintiffs contend that trover would have lain for the paper ; but it may be inferred, even

(a) Cro. Eliz. 206.

(b) 1 Stra. 94.

(c) 1 Cowp. 37.

from *Scott v. Jones*, that this would not be so unless the paper had some real value.

Sir *W. W. Follett*, contra. As to the observation that no actual delivery of a written paper appears, if that were considered important, the plaintiffs would ask leave to amend. The point was not taken on the former argument; and, when the declaration speaks of giving up a guaranty, which it describes as "then held" by the plaintiffs, it cannot reasonably be supposed that nothing is meant but foregoing an engagement. Supposing that no action would have lain on the first guaranty, here is an agreement between persons competent to make contracts, without imputation of fraud on either side, by which one is to give up an undertaking signed by the other, and the other in consideration of it is to provide for certain bills. It is assumed without reason that the defendant's only object in desiring to have the guaranty back must have been to prevent an action. He might not choose that his name should remain abroad in the mercantile world, annexed to such a document. It implies an admission which he might think proper to recall. He might not wish, if sued, to be put to a defence on the Statute of Frauds. If he attached a value to the document from any cause, however inadequate, as a man might be willing to give an immoderate price for a picture or autograph, the Court will not inquire into the goodness of the bargain. Giving up any thing of which they were possessed was a disadvantage to the plaintiffs; and the defendant here was benefited by it. The case therefore differs from that of a mere forbearance to sue, where nothing is given and received. The law of *Smith and Smith's Case* may be doubted. If the promisee there complied with terms by which the defendant obtained something from him, although those terms could not authorize the making of any illegal profit, it would seem that the defendant was bound. . . .

Supposing, however, that an action would not have lain on the first guaranty, yet, if the law upon the subject was doubtful (though *Boehm v. Campbell* makes it clear on the side of the plaintiffs), and the parties upon that doubt entered into a bargain for the abandonment of the guaranty, such bargain made with a knowledge of all the facts, is binding. *Longridge v. Dorville*; *Stracy v. The Bank of England*; Com. Dig. Action upon the Case upon Assumpsit (F. 87), referring to 1 Rol. Abr. 23, Action sur Case (V.), pl. 2728 (a). It is indeed asked, Who is supposed to entertain the doubt in point of law? But matters of law may be considered as doubtful to the courts; and arrangements in equity are often made on the ground of the law being doubtful. [BOSANQUET, J. A point may be considered so, on which learned men differ. LORD ABINGER, C. B. It is carrying fiction too far to say

(a) Comyns refers to *Kent v. Pratt*, Brownl. & Gold. 6, the case cited by Rolle. But it does not appear that any doubtful point of law was contemplated.

that the courts must always know how the law will be.] The parties here have made their contract on a consideration which they, knowing all the facts, thought beneficial; and this is enough. Merchantable or pecuniary value, in any more limited sense, is not to be insisted upon. The case falls within the principle of *Stevens v. Lynch*, and also within that of *Lee v. Muggeridge*, and other decisions which have turned upon moral obligation. It results from all these authorities that if parties, having made an engagement which ought to bind them but is incapable of being enforced, replace it by another, that new engagement is valid in law. If the contrary doctrine could prevail, what limit would there be to objections? Would a second or third renewal of guaranties be void on account of the original defect?

Lastly, as was contended below, if the consideration amounts to no more than the delivering up of a paper at the defendant's request, the Court cannot say that it is insufficient. If they do, at what point will they allow sufficiency of consideration to begin? Would the giving up an autograph, or a horse or dog of no merchantable value, be sufficient? [LORD ABINGER, C. B. The Attorney-General cited the case of a lease at will.] That relates to a surrender, not the giving up of a document. Papers, though ineffectual for the purpose contemplated in drawing them up, may have a value from the mere wish of a party to get them into his own hands. [ROLFE, B. The Lord Chancellor has said that he will never compel the giving up of an instrument which is void on the face of it.] An application in equity for that purpose is very different from the enforcing of a bargain to give up something which is considered valuable. [BOSANQUET, J. Is not the document property, however small the value?] Yes; and trover would lie for it. In *Wilkinson v. Oliveira (a)* it was held sufficient consideration for a promise to pay £1000 that the plaintiff, being possessed of a certain letter, had given it to the defendant. It is true that the defendant was alleged to have made a beneficial use of the letter; but that was not an essential part of the consideration. Here the defendant could judge of the value of the document, and using his judgment made the promise. He cannot now annul it on the ground that the instrument was of no value.

Sir *J. Campbell*, Attorney-General, in reply. The last argument rests on a fallacious assumption. The bargain declared upon was not for the delivery of a piece of paper, but for the release of a contract. It does not appear that the paper itself may not even now be in the plaintiff's possession. The plea, that the guaranty was of no effect, agrees with this view of the case. The main argument on the other side, assuming the first guaranty to be void, is in effect that, because it was given up at the defendant's request, he is estopped from saying

(a) 1 New Ca. 490.

that such an abandonment was no consideration for his promise. But this is contrary to the principle of many *placita* in Com. Dig., Action upon the Case upon Assumpsit (F. 8), already cited. On those authorities, if the right foregone was in reality null, it cannot be material that the parties made their agreement on a contrary supposition. . . .

*Stevens v. Lynch*, where the holder of a bill had given time to the acceptor, and the drawer waived the benefit of that circumstance, is not applicable to the present case. As to *Lee v. Muggeridge* and the other cases which have turned upon moral obligation, it is sufficient to say that here no moral obligation appears for the first guaranty, and the declaration does not allege any consideration for the second guaranty, but the abandonment of the first.

*Cur. adv. vult.*

LORD ABINGER, C. B., in the same Vacation (June 29th) delivered the judgment of the Court.

In the case of *Brooks v. Haigh* the judgment of the Court is to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guaranty an ambiguity that might be explained by evidence, so as to make it a valid contract; and therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guaranty was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents.

*Judgment affirmed.*

## GREAT NORTHERN RAILWAY COMPANY v. WITHAM.

IN THE COMMON PLEAS, NOVEMBER 6, 1873.

[*Reported in Law Reports, 9 Common Pleas, 16.*]

THE first count of the declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster station, and that the plaintiffs should buy and accept of him, any quantity they might require and order of him during a period ending on the 31st of October, 1872, of certain descriptions of iron, at certain prices agreed on between them; that all things were done and happened and existed,

and times had elapsed, to entitle the plaintiffs to a performance by the defendant of his agreement and to maintain the action for the breach by him of the same as thereafter alleged ; yet that the defendant did not nor would supply and sell and deliver to the plaintiffs at Doncaster station or elsewhere divers quantities of the said descriptions of iron, which the plaintiffs required and ordered of him during the said period, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid by them as aforesaid, and were otherwise injured.

Second count, that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster station, and that the plaintiffs should buy and accept of him, any quantity they might order of him for half the requirements of the plaintiffs during the said period ending on the 31st of October, 1872, of certain descriptions of iron, at certain prices agreed on between them ; that all things were done, &c., yet the defendant did not nor would supply and sell and deliver to the plaintiffs, as agreed on as aforesaid, divers quantities of the said descriptions of iron, which the plaintiffs ordered of him for half the requirements of the plaintiffs during the said period ending the 31st of October, 1872, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid as aforesaid, and were otherwise injured. Claim, 2000*l*.

Pleas : 1. That it was not agreed by and between the plaintiffs and the defendant, as alleged ; 2. That the plaintiffs did not require or order iron as in the declaration alleged.

There was also a demurrer to each count of the declaration, on the ground that it disclosed no consideration for the defendant's promise to supply the iron therein mentioned. Issue, and joinder in demurrer.

The cause was tried before Brett, J., at the sittings at Westminster after the last term. The facts were as follows :—In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows :—

“I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

(Signed) “Samuel Witham.”

The company's officer wrote in reply, as follows :—

" Mr. S. Witham.

" Sir,—I am instructed to inform you that my directors have accepted your tender, dated, &c., to supply this company at Doncaster station any quantity they may order during the period ending 31st of October, 1872, of the descriptions of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter,

(Signed) " S. Fitch, Assistant Secretary."

To this the defendant replied,—“ I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. Witham.”

Several orders for iron were given by the company, which were from time to time duly executed by the defendant ; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs,

Nov. 5. *Digby Seymour*, Q.C., moved to enter a nonsuit, on the ground that the contract was void for want of mutuality. He contended that, as the company did not bind themselves to take any iron whatever from the defendant, his promise to supply them with iron was a promise without consideration. He cited *Lees v. Whitcomb* (a) ; *Burton v. Great Northern Railway Co.* (b) ; *Sykes v. Dixon* (c) ; and *Bealey v. Stuart* (d).

*Curr. adv. vult.*

Nov. 6. *KEATING, J.* In this case Mr. Digby Seymour moved to enter a nonsuit. The circumstances were these :—The Great Northern Railway Company advertised for tenders for the supply of stores. The defendant made a tender in these words,—“ I hereby undertake to supply the Great Northern Railway Company, for twelve months, from &c. to &c., with such quantities of each or any of the several articles named in the attached specifications as the company's store-keeper may order from time to time, at the price set opposite each article respectively,” &c. Some orders were given by the company, which were duly executed. But the order now in question was not executed ; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods ; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving

(a) 5 Bing. 34.

(c) 9 Ad. & E. 693.

(b) 9 Ex. 507; 23 L. J. (Ex.) 184.

(d) 7 H. & N. 753; 31 L. J. (Ex.) 281.



from the company, and therefore no obligation on the defendant to supply the goods. The case mainly relied on in support of that contention was *Burton v. Great Northern Railway Co. (a)*. But that is not an authority in the defendant's favor. It was the converse case. The Court there held that no action would lie against the company for not giving an order. If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

BRETT, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you 100*l.*," that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to the 100*l.* His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none had been cited. *Burton v. Great Northern Railway Co. (a)* is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

GROVE, J. I am of the same opinion, and have nothing to add.

*Rule refused.*

(a) 9 Ex. 507; 23 L. J. (Ex.) 184.

## SECTION IV.—COMPROMISE AND FORBEARANCE.\*

FISHER v. RICHARDSON, *Executor*, & HILL.

IN THE KING'S BENCH, MICHAELMAS TERM, 1603.

[Reported in *Croke's James*, 47.]

ASSUMPSIT. For that the Testator being indebted unto him by single contract, the Defendant being Executor, and having assets in his hands to satisfie all debts and legacies, assumed, that if he forbear to sue him until such a time, he would pay ; and alledgeth *in facto*, that he forbear and had assets, &c. and hereupon the Defendant demurred. *Hedley* argued for the Plaintiff ; that inasmuch as the testator was chargeable at the common law in an Assumpsit, (as hath been adjudged) the duty remains, although he be dead. And although no action of debt lies against the executor, because the testator might have waged his law ; yet an action upon the case lies, with an averment of Assets to satisfie, as the case is betwixt Norr and Read ; and if in this case, debt be brought against the executor, if he pleads *Non debet*, he shall be charged ; therefore the staying of the suit is sufficient consideration to ground this action. And here he might have been sued in Chancery, the staying whereof is good cause of Assumpsit : Wherefore, &c. And of this opinion was the whole Court, with out argument. Wherefore it was adjudged for the Plaintiff.

## BIDWELL v. CATTON

HILARY TERM, 1618.

[Reported in *Hobart*, 216.]

BIDWELL, an attorney brought an action of the case against Catton Executor of Reve, and counted that, whereas he had in Michaelmas Term, 14 Jac. prosecuted an attachment of privilege against Reve the Testator, returnable in Hil. Term, the Testator knowing of it, in consideration that, at his request, the plaintiff would forbear to prosecute the said writ any further against the said testator, the testator did promise to pay him £50. And then avers, &c. And after a verdict it was excepted in arrest of judgment :

First, that it was not alleged that the plaintiff had any just cause of action.

Secondly, that this action still remains. . .

\* Ch. III, Sect. IV, Finch.

But the Court nevertheless gave judgment : For first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. Quaere, if the Defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both benefit to the one, and loss to the other. . .

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LOYD v. LEE.

BEFORE PRATT, C. J. AT NISI PRIUS, 1718.

[*Reported in 1 Strange, 94.*]

A MARRIED woman gives a promissory note as a *feme sole* ; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her, it was insisted that, though, she being under coverture at the time of giving the note, it was voidable for that reason, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void ; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.

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JONES v ASHBURNHAM AND NANCY HIS WIFE.

IN THE KING'S BENCH, JANUARY 31, 1804.

[*Reported in 4 East, 455.*]

THE Plaintiff declared that whereas one S. F. Bancroft, since deceased, at the time of his death was indebted to him in 58*l.* for goods before that time sold and delivered to the deceased, whereof the defendant Nancy had notice, and thereupon, after the death of Bancroft, the defendant Nancy, before her intermarriage with the other defendant Ashburnham, in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the defendant Nancy, would forbear and give day of payment of the said 58*l.* as aftermentioned, she the said Nancy, by a note in writing signed by her according to the form of the statute, &c. on the 20th of March 1801, undertook and promised the plaintiff to discharge the

said debt so due and owing to him in a reasonable time, and to send him 20*l.* in part payment in the July following: and although the same July is long since passed, during which the said Nancy continued sole, and a reasonable time elapsed for the payment of the whole 58*l.*, according to the tenor and effect of the said promise, and though the plaintiff has always from the time of making the said promise hitherto forborne and given day of payment of the said debt, whereof the defendant Nancy before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, &c. refused to pay, &c. There were other counts in substance the same; one alleging the forbearance to be till July, &c. To all which there was a demurrer, assigning for special causes; that it is not alleged in the declaration from whom the said sum of 58*l.* therein mentioned was due and owing to the plaintiff at the time when the defendant Nancy is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said 58*l.*; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff has any good cause of action against the defendants, &c.

Marryat in support of the demurrer. This is a promise made by a stranger to the original contract or consideration for the supposed forbearance. But a promise to forbear generally is not a sufficient foundation for an assumpsit without showing a person who was liable to pay the debt. If the promise had been laid barely for forbearing to sue the defendant, it not appearing that she was before liable for any debt to the plaintiff, the action could not have been sustained: then it cannot aid the plaint that a debt is stated to be due to the plaintiff, without stating any person from whom he could have enforced payment. It is not enough that there may be some person liable to him in *rerum naturâ* who is unknown. All the cases upon the subject are collected in 1 Com. Dig. 160, Action upon the Case upon Assumpsit, F. 8, which show that no action can be maintained upon an assumpsit in consideration of forbearance where the party was not chargeable; as in the case of an heir who has no assets. This case is not distinguishable in principle from those. To sustain such an action the plaintiff must show that he was in a situation to forbear some person whom he might have sued, whom it would have been beneficial to him to have sued, and consequently, whom it was detrimental to him to forbear suing. Here it is not shown that any person was liable to the plaintiff at the time of the promise made; for the original debtor was dead, and no representation was taken out,

nor, for aught appears, any assets, nor any suit surceased in consequence of the promise which the plaintiff could have supported. In *Smith v. Jones* (a), the plaintiff declared that his father bequeathed him a legacy of 7*l.* and made C. his executrix, and died, and that the defendant intermarried with C.; and that in consideration that assets of the plaintiff's father came into the hands of the defendant, and in consideration that the plaintiff would forbear (b) the 7*l.* till All Saints following, the defendant promised to pay it at that time: and then the plaintiff showed that he had forborne, &c. till the day, yet the defendant had not paid him. The plaintiff pleaded that C., the executrix of the father, died intestate at such a place before the promise made: upon which the plaintiff demurred; and the judgment was given against him: for by the death of the executrix before the promise, it appeared that there was not any consideration sufficient to charge the defendant, who was not chargeable with the legacy after the death of his wife, the executrix. The report states further, that the declaration was also holden ill, "because it did not show precisely what person the plaintiff was to forbear to sue for the 7*l.*; for it could not be intended that he should forbear the defendant, who it appeared by law was not chargeable with it." So in *Rosyer v. Langdale* (c), the plaintiff declared against a feme administratrix, that she, in consideration that he would forbear suit until she had taken out letters of administration, promised to pay him a certain sum owing to him by her intestate. And after verdict and judgment, error was brought; for that the plaintiff had set forth no consideration for the assumpsit; for till administration taken out by the defendant she was not liable to be sued, except there were a cause depending, which there was not. And this was holden to be a good exception. The subsequent case indeed, of *Hume v. Hinton* (d), may seem to contradict that, where it was holden that a general forbearance of the debt was in effect a forbearance to sue all the world, and was sufficient to uphold an assumpsit, without showing that any particular person was liable to pay: but that, it is to be observed, was after verdict, when it might be presumed that some person was shown to be liable. And further, it is said to have been decided upon the authority of a case of *Hill v. Bailey*, overruling that of *Smith v. Jones*. But in *Hill v. Bailey*, which is reported in 1 Rol. Abr. 22 (e), there was an averment that the goods of the plaintiff's debtor came legitimo modo after his death to the defendant, who, in consideration that the plaintiff would forbear his debt, promised to pay it. There was, therefore, a good consideration for the promise to forbear generally. And in *Rey-*

(a) Yelv. 184.

(b) *i. e.* forbear to sue the defendant for the 7*l.* according to the report of the s. c. in Cro. Jac. 257.(c) Sty. 248, and *vide* *Hayward v. Duckett*, ib. 405.

(d) Sty. 304.

(e) And *vide* 1 Danv. Abr. 50.

*nolds v. Prosser* (a), Hardres, in argument, cites the same case of *Hume v. Hinton* (under the name of *Hummers v. Hunton*), as having been adjudged to be no consideration to sustain the promise. There is another case which may be cited for the plaintiff, of *Quick v. Copleton* (b), where the defendant's late husband being indebted to the plaintiff, and the defendant about to come to London, and in fear of being arrested by the plaintiff, she promised to pay him in consideration that he would not trouble her, and would forbear till Michaelmas. And after verdict it was moved in arrest of judgment, that she not being shown to be executrix or administratrix, her forbearance was not any consideration; which was agreed by the Court: but they held that the subsequent words, forbear till Michaelmas, were general, not only to forbear her but all others, and made a good consideration. But the opinion afterwards delivered by Hyde, C. J., very much shakes the authority of this case; for he says that a forbearance to sue one who fears to be sued is a good consideration; which certainly cannot be maintained; and he cited a case in C. B. when he sat there, where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix. But of this the other Judges are said to have doubted. [LORD ELLENBOROUGH, C. J. It is impossible to contend that this last forbearance could be a good consideration for an assumpsit; for to seize a dead body upon any such pretence would be contra bonos mores, and an extortion upon the relatives.] The weight then of the authorities is with the defendant, as the principle clearly is with him. For as where the forbearance is stated to be of the defendant himself, the plaintiff must show that he was before liable to be sued; so when the forbearance is general, of all the world, it is equally reasonable that the plaintiff should show some one person who was liable to him: for the forbearance of a groundless suit has been holden to be no consideration for an assumpsit; as in *Tooley v. Windham* (c), and *Loyd v. Lee* (d). Here the defendant is not shown to be executrix or administratrix, or to have assets; and a promise even by an executor, as such, is a mere *nudum pactum* without assets at the time (e).

*Jervis*, contra. The consideration of general forbearance, as here laid, is sufficient to maintain the assumpsit. To sustain a promise the consideration must either be beneficial to the defendant or detrimental to the plaintiff. In *Pillans v. Van Mierop* (f), Yates, J. says, "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking:" he adds, that there

(a) Hardr. 73.

(b) 1 Lev. 161. 1 Sid. 242. 1 Keb. 866.

(c) Cro. Eliz. 206.

(d) 1 Stra. 94.

(e) *Rann v. Hughes*, 7 Term Rep. 350.n. a.

(f) 3 Burr. 1673.

"the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." It is a part of the definition that there must be a right in the plaintiff; which furnishes an answer to the cases of *Tooley v. Windham* (a), and *Loyd v. Lee* (b), where no such right appeared. Now here the plaintiff shows a debt due, and a right to recover, though not against any person named: but it is enough that he shows a possibility of loss by the forbearance. [LORD ELLENBOROUGH, C. J. It is not entitled to the name of forbearance unless you show something or somebody to be forborne. If there be a right which can be enforced against any body, no doubt that a promise to forbear is a good consideration: but if there be no person liable, how is it entitled to the name or quality of forbearance?] The cases show that it is sufficient if there be a right in the plaintiff, which is forborne, though not shown to be capable of being enforced at the time against any particular person; as in *Quick v. Copleton* (c), where the consideration relied on by the Court was not the fear of being sued, but the general forbearance, "to forbear till Michaelmas." And yet it was not averred there that either the defendant or any other person was executrix, &c. of the deceased debtor; and consequently no person appeared to be liable to the plaintiff at the time. So in the case of *Hill v. Bailey* in 1 Rol. Abr. 22, the consideration relied on was not that the goods of the deceased debtor came to the defendant's hands legitimo modo, for then there was no occasion to lay any forbearance; but the judgment turned on the sufficiency of the general forbearance to sue, to sustain the assumpsit. [LAWRENCE, J. The promise to forbear goes farther than the lawful possession of assets; for it makes the defendant liable to judgment de bonis propriis, and not merely as far as the assets go.] Then the case of *Hume v. Hinton* (d) is in point (which is merely misquoted by Hardres (e) in argument), and that was subsequent to *Smith v. Jones* (f), which, it appears from all the reports of it taken together, was a promise, not for forbearance generally, but to forbear the defendant; which reconciles the authorities: and the same answer will apply to *Rosyer v. Langdale* (g), which was a promise in consideration that the plaintiff would forbear suit until the defendant had taken out administration; which was taken to mean a forbearance to sue the defendant. But where a person is sued as executor, which was the case in *Rann v. Hughes* (h), his liability on a promise to pay can only be coextensive with his original liability in respect of assets.

*Marryat*, in reply, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The way in which I am disposed to consider this case will break in upon no recognized rule of law, nor on the plain sense of what was laid down by Mr. Justice Yates, in the

(a) Cro. Eliz. 206.

(b) 1 Stra. 94.

(c) 1 Lev. 161. 1 Sid. 242. 1 Keb. 866.

(d) Sty. 304.

(e) Hardr. 73.

(f) Yelv. 184. Cro. Jac. 257. Owen, 133.

(g) Sty. 248.

(h) 7 Term Rep. 350, n.

case of *Pillans v. Van Mierop*. It is known rule of law, that to make a promise obligatory there must be some benefit to the party making it, or some detriment to the party to whom it is made; otherwise it is considered as nudum pactum and cannot be enforced. I do not say that the opinion which I have formed will not break in on any of the cases which have been cited, but it entrenches on no general rule; and in order to show that, I will examine the rule referred to as laid down by Mr. Justice Yates, and see how it applies to the present case. He says that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," &c. Now how does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit: where it does not appear that any person in *rerum natura* was liable to be sued by him? No right can exist in this vague, abstract, and indefinite way. Right is a correlative term: there must be some object of right; some object of suit; some party who, in respect of some fund or some character known in the law, is liable; otherwise there cannot be said to be any right. Has there been then any suspension of the plaintiff's right? Now unless a right is capable of being exercised, unless it can be put in force, there can be no suspension of it. And that it could have been exercised or put in force, but for the promise made by the defendant, is not shown. Then what forbearance is shown? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it; but it does not appear here that the forbearance could produce any detriment to the plaintiff. It does not therefore appear that Mr. Justice Yates laid down any doctrine which does not square with the general received rule of law, that to sustain a promise there must be a benefit on the one hand or a detriment on the other. But here, whether there were any representative or any funds of the original debtor does not appear. Then as to the cases cited, that of *Rosyer v. Langdale* is strong to the purpose; for it was there decided that a promise in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined; for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by that of *Hume v. Hinton*, in the same book, where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the



intestate's effects as to make herself liable as executrix de son tort, and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. But no such intendment can be made here. The case of *Quick v. Copleton* is also relied on. That too was after verdict; and it was moved in arrest of judgment, for want of consideration. I think that even after verdict, that declaration would be bad, being vicious on the face of it. It is stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character) about to come to London, and being in fear to be arrested by the plaintiff, promised, &c. Now an attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad) can never be a good consideration for a promise to pay: yet that ground is insisted on by the Chief Justice. And as to the case there cited by him, of a mother who promised to pay, on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do; it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shown by him on the face of the declaration, and this coming on upon demurrer where nothing can be intended, as it may after verdict, I am clearly of opinion that the declaration is bad.

GROSE, J. It must be admitted, that if a consideration for the promise do not sufficiently appear upon the face of the declaration, it cannot be supported. There is a great difference between questions of this sort, arising upon demurrer to the declaration, and in arrest of judgment after verdict; in which latter case everything is to be intended which can be in favor of the verdict: but not so on demurrer. It is however said, that a detriment to the plaintiff will support an assumpsit as well as a benefit to the defendant, and that here the plaintiff alleges a forbearance. But it is a perversion of terms to call that a forbearance to sue if there were no person who was capable of being sued; and here none is shown. There can be no forbearance in such a case; and therefore there is an end of the consideration. This is too plain to require any thing further to be said upon it, and makes it unnecessary, after what my Lord has said, to enter into the consideration of the cases.

LAWRENCE, J. This question arises upon a special demurrer, which points out an objection to the declaration, that no person is stated who

was liable to be sued at the time of the promise made, in respect to whom the plaintiff can be said to have forbore suit. And on this ground the case is distinguishable from those relied on by the plaintiff's counsel, which were after verdict; and in support of which it might be said that when the jury found that the plaintiff did forbear to sue, they must be presumed to have found, upon proof laid before them, that there was somebody who could have been sued. But no such intendment can be made upon demurrer. The argument proceeds upon a fallacy, in supposing that some person must exist liable to the plaintiff's suit, to forbear whom must consequently be a disadvantage to him, and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets, and there might be no administration to him taken out: there would then be no person to sue. So he might be a bastard and have no legal representatives entitled to take out administration of his effects, in which case the Crown would be entitled to them; and still there would be nobody to be sued. It is not therefore true that there must be somebody liable to whom a forbearance to sue may refer. And I agree with the argument of the defendant's counsel that if it be no consideration for the promise to forbear to sue the defendant without showing that the defendant was before liable to have been sued, it can be no consideration for a promise to forbear to sue all the world generally, without showing that some person or other was liable to be sued: for without that, the plaintiff does not show any detriment arising to him from the forbearance of his suit. The principle is admitted that the plaintiff must show some benefit to the defendant or some detriment to himself. And I understand Mr. Justice Yates, in illustrating that principle in the passage cited, to say that where it appears on the face of the declaration that there is somebody whom the plaintiff may sue, it is not necessary to show that he would be benefited by suing him; it is sufficient that there is some person whom he might sue and from whom he might obtain satisfaction.

LE BLANC, J. The definition by Mr. Justice Yates of a consideration sufficient to maintain a promise is, that it be either of some benefit to the defendant or some detriment to the plaintiff. It is sufficient, if it be a detriment to the plaintiff, though no actual benefit accrue to the party undertaking. So far only the definition goes. Afterwards, indeed, in commenting on that definition, he says that the promise of the defendant did occasion a possibility of loss to the plaintiffs. They might, he says, have been thereby prevented from resorting to the original debtor, or getting further security from him. But all this latter part is only a comment on the definition, and showing how the case then in judgment applied to it. But I do not take it to be any part of the definition itself intended to be laid down by him, that if

any person stated that he had forborne suing on a cause of action which might (or might not) by possibility occasion a loss to him, that was sufficient ground for an undertaking by another to pay him. Now here the plaintiff endeavors to make out a detriment to himself by showing that one deceased was indebted to him, and that in consideration that he would forbear and give day of payment the defendant promised, &c. But it does not follow of course from thence that any detriment arose to the plaintiff from his forbearance, if it do not appear that there was any person whom he could have sued. And the general current of authorities shows that it is not sufficient to state a consideration to forbear generally, unless it be also shown that there was some person to be forborne. Now here the declaration does not state that there was any representative of the debtor, or that any person had taken out administration to him, or that any person was going to administer to the effects and to satisfy the plaintiff's debt, but was prevented from so doing by the undertaking of the defendant. There, therefore, appears to be a want of consideration to sustain the promise.

*Judgment for the Defendant.*

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ATTWOOD v. ———

IN CHANCERY, MARCH 6, 7, 8, 13, 1826.

[*Reported in 1 Russell, 353.*]

Mrs. SHACKLE, as the executrix of her husband, John Baptist Shackle, was entitled to a sum of about 1800*l.*, due from one Norton, which was secured by promissory notes, and a bond, as well as by the deposit of the lease of a brewery and other property. In July, 1822, application was made to Norton to pay the debt; it was not convenient for him to do so; but he stated, both to Mrs. Shackle and to W., her solicitor, that he had agreed to sell some leasehold property in Uxbridge, called the King's Arms Inn, and that, when the sale was completed, her demand, or a part of it, would be paid out of the purchase-money. These latter premises were subject to a prior equitable charge of 1000*l.*, due to W., as the executor of Martha Hill; and the title-deeds were at that time in W.'s possession. W. had been the solicitor of Mrs. Shackle's husband, and was employed by her in the same capacity; and the securities for the debt owing to her by Norton were in his hands. In this state of things, Mrs. Shackle, in July, 1822, procured from Norton a written order, in the following words:

"Sir: I have agreed to settle Mrs. Shackle's account by the sale of the King's Arms, so that you will receive, upon settlement, the whole

of the amount, 2500*l.* : 1000*l.* for yourself, and 1500*l.* for Mrs. Shackle; the remainder to be paid in cash to Mrs. Shackle.

“DANIELL SCOTT NORTON.

“July 12th, 1822.

“Any thing you may wish me to sign for the purpose, I shall be happy to do.”

This order was not addressed to any person, but was left at W.'s office, by a son-in-law of Mrs. Shackle.

In February following, Norton paid W. the 1000*l.* due to Mrs. Hill's estate; and on that occasion, W., notwithstanding the purport of the note transmitted to him in July, 1822, proceeded, without authority from, or communication with, Mrs. Shackle, to deliver to Norton the title-deeds of the property of which Mrs. Hill had been the mortgagee. Norton then completed the sale of the King's Arms Inn; received the purchase-money; did not pay any part of it to Mrs. Shackle; and, in March, 1823, became bankrupt. The premises thus sold had yielded about 1500*l.* beyond the 1000*l.* paid in discharge of Mrs. Hill's equitable mortgage.

A few days after W. had parted with the deeds, Mrs. Shackle, conceiving that he was not attending properly to her interests, removed her securities from the custody of W.; and, discovering what had happened, employed another solicitor. Under his advice, she immediately insisted that W. had been guilty of negligence in delivering the deeds of the King's Arms Inn to Norton, when he had an order which gave him a right to retain them till her demand was satisfied, and made it his duty not to part with them till he had received 1500*l.* on her account. Her demand he knew to be still unpaid, and he was bound, as her then solicitor, to protect her interest to the utmost; and she contended, therefore, that he was answerable to her for 1500*l.*, being that portion of the purchase-money which the possession of the title-deeds would have enabled her to receive. A correspondence and negotiation on the subject took place; W. consulted with counsel, who advised him that he was liable; and, towards the end of March, the terms of a compromise were agreed upon. These terms were, that W. should pay to Mrs. Shackle 1480*l.* on the 10th of April, and that she should assign to him her demand against Norton's estate, together with the securities which she held for it. Accordingly both parties signed an agreement to that effect; the securities were handed over to W., and he and Mrs. Shackle went to Guildhall in order to prove the debt against Norton's estate, but were prevented from making the proof by an accidental circumstance.

W., having gotten the agreement into his possession, refused to abide by it. Mrs. Shackle died; and the bill was filed by her personal rep-

representatives, in order to have the agreement delivered up to them, and performed specifically.

Mr. *Horne*, and Mr. *Rawlins*, for the Plaintiff.

Mr. *Heald*, Mr. *Sugden*, and Mr. *Roupell*, for the Defendant.

The Defendant resisted the relief on various grounds. He alleged that the agreement had been obtained from him by misrepresentation on the part of Mrs. Shackle and her professional adviser; that she, by her communications with Norton, had waived any lien which she might otherwise have had on the title-deeds in W.'s custody, and, through them, on the produce of the premises when sold; or at all events, that she, by certain subsequent dealings, had restricted her lien to a sum of 800*l.*; and therefore that his liability could not exceed that amount.

These points depended entirely on the details of the evidence in the cause. Upon that evidence the Master of the Rolls was of opinion that there had been no misrepresentation on the part of Mrs. Shackle; and that the dealings, which were relied upon as being a waiver of her claim, or as restricting its amount, having taken place before she was apprised of what W. had done, could in no way affect his liability or her right against him.

Another ground of defence was, that the agreement was entered into without a sufficient consideration, and under a mistake of W. as to his legal liabilities.

The deeds, it was said, were in W.'s hands, as executor of Mrs. Hill; he did not hold them as a trustee for Mrs. Shackle; he was an equitable mortgagee, who, the moment his own demand was satisfied, could, without any breach of duty, deliver up the deeds to his mortgagor. The note from Norton imposed on him no duty or liability; that note was not addressed to any person by name; and it would be extravagant to hold, that the mere circumstance of leaving such a scrap of paper at his office, could force upon him the most grave responsibilities towards a third person. What though that third person happened to be one of his clients? It is not part of the duty of a solicitor to become an equitable mortgagee, in order the better to enable a client to obtain payment of his debt. In truth, that note gave no power, created no obligation, imposed no trust. It was a mere promise on the part of Norton; an intimation of how he meant to apply the purchase-money of the premises.

The Plaintiff ought to prove that Mrs. Shackle had a lien on the property in question, and that W. was bound to make that lien effectual by retaining the title-deeds. They have proved neither the one point nor the other; and they cannot succeed, unless they prove both.

Even, therefore, if there has been no misrepresentation, it is plain that W. entered into this agreement under mistake, believing himself

to be liable to a demand, which was in truth altogether without substance.

If there was no liability anterior to the agreement, then the agreement was without consideration. It is true, that it is in form a mere contract for the purchase at a given price of the debt due from Norton to Mrs. Shackle, and of the securities for it which she held. But that was not the real nature of the transaction. The case which the Plaintiffs make is, that the agreement for that pretended purchase was entered into as a compromise of the liability which W. had incurred. If they do not make out the reality of that liability, which was the sole consideration for his undertaking to pay a large sum of money, the agreement is without consideration; and, viewed in either light, as made without consideration, or as entered into under mistake, it is an agreement which a Court of Equity will not lend its aid to enforce.

THE MASTER OF THE ROLLS.

The Defendant insists that the order delivered to him in July, 1822, did not impose on him an obligation not to part with the deeds relating to the property which was in pledge to Mrs. Hill, without taking care that the 1500*l.*, which would remain after Mrs. Hill's demand was satisfied, was applied in diminution of the debt due to Mrs. Shackle, and that it did not subject him to any liability in consequence of his having acted in a different manner. It is not necessary for the Plaintiff to make out that point. It is sufficient that a *bond fide* claim had been made on W. in consequence of his supposed negligence. He deliberates, he consults, and finally, he concludes a compromise. He agrees to put an end to the claim against him, by at once paying Mrs. Shackle a sum of 1480*l.*, and he takes upon himself the chance of recovering what he may out of Norton's estate, by means of the securities which Mrs. Shackle held.

It is said that no sufficient consideration passed from Mrs. Shackle to W. for his entering into the agreement, of which performance is now sought to be enforced; because, in point of law, the order sent by Norton to W. did not amount, in the hands of the latter, who was the depositary of the deeds on behalf of Mrs. Hill, to such an authority for retaining them until Mrs. Shackle's debt was paid, as would render him liable for a breach of duty in giving them up when Mrs. Hill's claims were satisfied. But I do not think it necessary to decide the question with respect to the effect of the delivery of the order; because if the claim were fairly and *bond fide* made by Mrs. Shackle against W., on the ground that he had been guilty of such negligence as would entitle her to enforce a demand against him in law or equity; and if W., after due consideration, not only admits his liability, but compromises the claim, and for that purpose enters into an agreement; the compromise of such a claim entered into with due deliberation,

even if it were doubtful whether the claim was such as could have been made effectual, is a sufficient consideration, both in law and in equity, for such an agreement. For that reason I do not inquire, whether, before the agreement was entered into, Mrs. Shackle had or had not a valid demand against the present Defendant. It is enough for me to say, that here was a claim made on grounds sufficiently disclosed at the time; that, after due deliberation, W. yielded to the claim; and that he finally compromised it, not merely by paying a sum of money which might be deemed an equivalent for the damages which Mrs. Shackle contended she might have recovered against him, but by way of purchase from her of the very debt which she had a right to prove against Norton's estate, and by receiving from her the securities.

The objection of want of consideration for the agreement, has no more foundation than the objection which proceeded upon the Defendant's alleged mistake as to his legal liability.

There was no misrepresentation on Mrs. Shackle's part, either as to the nature or as to the extent of her demand; W. had ample time and opportunity to consider duly his liability; he did do so, acknowledged his liability, and entered into this agreement. The grounds of defence have, therefore, wholly failed, and I am bound to pronounce a decree for the Plaintiff with costs.

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### THE ALLIANCE BANK LIMITED *v.* BROOM.

IN CHANCERY, NOVEMBER 14, 21, 1864.

[*Reported in 2 Drewry & Smale, 289.*]

THIS case came on upon a demurrer.

It appeared from the bill that, in June, 1864, the Alliance Bank opened a loan-account with the defendants, who are merchants at Liverpool, and that such loan-account was continued down to the 19th of September, 1864, when there was a balance due from the defendants to the bank on such loan-account to the amount of £22,205 15s. 1d.

On the 19th of September, 1864, the plaintiffs requested the defendants, Messrs. Broom, to give them some security for the amount so due; and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the bank the following letter:—

LIVERPOOL, 19th Sept., 1864.

DEAR SIR,—We hand you the following particulars of produce, which we propose to hypothecate against our loan-account, and at the same time undertake to pay the proceeds, as we receive them, to the credit of the said account.

The letter then contained a list of goods and their values, and was signed by Messrs. Broom.

In pursuance of this letter the plaintiffs, on the 20th of September, 1864, applied to the defendants for the warrants for delivery of the goods mentioned in the letter, and the defendants promised to deliver the warrants to the plaintiffs as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants, or other documents relating to the goods, to the plaintiffs, and threatened and intended to deliver them to other persons; and the bill charged that the plaintiffs were entitled to a lien or charge upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be ordered to deliver to the plaintiffs the warrants and other documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due to them on the loan-account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration; and therefore one which the court would not enforce.

Mr. *Daniel* and Mr. *J. N. Higgins*, for the defendants, in support of the demurrer, contended that the agreement contained in the letter was executory; being also without consideration, the court would not enforce it. The existence of a debt was no sufficient consideration to support the agreement. There was a distinction between a motive and a consideration,—what might be good as a motive might be bad as a consideration; and that was so in this case. And therefore the bill, which sought the specific performance of such an agreement, could not be sustained. They referred to *Eastwood v. Kenyon* (a), *Thomas v. Thomas* (b), *Hopkins v. Logan* (c), *Kaye v. Dutton* (d), *Smith on Contracts* (e), *Addison on Contracts* (f).

Mr. *Bevir*, for the plaintiffs, in support of the bill, submitted that there was a good consideration for the agreement; namely, forbearance on the part of the plaintiffs from calling in their money. *Twyne's Case* (g).

Mr. *Daniel*, in reply.

The Vice-Chancellor reserved judgment.

The VICE-CHANCELLOR, after stating the facts, said :—

(a) 11 Ad. & El. 450. (b) 2 Q. B. 859. (c) 5 M. & W. 241. (d) 7 M. & Gr. 815.  
(e) P. 89. (f) Pp. 6 and 296. (g) 3 Coke, 80 b.



The defendant demurs to the plaintiff's bill in this case, on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration,—that is in fact a nudum pactum, which the court will not enforce; and in support of this proposition it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought an action for the payment of the debt; and that they could have done so is perfectly true.

Now, according to the facts stated in the bill, a demand was made by the creditor for security; and upon that demand a promise and agreement was made by the debtor that he would give such security, and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degrees of forbearance, not indeed for any definite time, but at all events some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

On this ground the demurrer must be overruled (a).

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### CALLISHER v. BISCHOFFSHEIM.

IN THE QUEEN'S BENCH, JUNE 6, 1870.

[Reported in *Law Reports*, 5 *Queen's Bench*, 440.]

DECLARATION, that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the government of Honduras, and from Don Carlos Gattierez, and others, and had threatened, and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that

(a) In *Oldershaw v. King*, 2 H. & N. 517, (Exchequer Chamber) it was held that forbearance for a reasonable time was a sufficient consideration for a promise to guarantee, and that what was a reasonable time was to be considered and determined with reference to the circumstances of the case. ED.

the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of £600, immediately the bonds should be printed. Averment, that the plaintiff did not take any proceedings during the agreed period, or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach, that the defendant had not delivered to the plaintiff the bonds, or any of them.

Plea, that at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

*James*, Q. C. (*Rose* with him), in support of the demurrer. The plea is bad, and affords no answer to the declaration, which discloses a good cause of action. The consideration for the plaintiff's promise or contract is sufficient; it is sufficient if the contractor, or some third person, avoids some detriment or injury; here the annoyance and expense of an action are avoided. In *Llewellyn v. Llewellyn* (a) the declaration alleged that there were disputes concerning accounts between the plaintiff and defendant, and in consideration that the plaintiff would relinquish all claims the defendant promised he would pay the plaintiff an annuity. There was no allegation that any sum was due to the plaintiff; it might be that the plaintiff's claim could not be sustained; but it was held that the declaration disclosed a sufficient consideration.

[BLACKBURN, J. We must assume, on this record, that the plaintiff believed that he had a valid claim against the Honduras Government.]

*Cook v. Wright* (b) is in point. There the defendant knew he was not liable to satisfy the claim made by the plaintiff; but the plaintiff, bona fide believing him to be personally liable, threatened to take proceedings, and a forbearing to take those proceedings was held a good consideration for the defendant compromising the claim by giving promissory notes. In *Wade v. Simeon* (c) it was expressly averred in the plea that the plaintiff knew he had no cause of action, and it was therefore held good. The plaintiff has fulfilled his part of the contract, he has abstained from enforcing his claim whether good or bad, and the defendant ought not to be allowed to say he will not fulfil his contract. The position of the parties is altered, and the plaintiff may have been put to expense in stopping the proceedings. The consideration is not an abandonment of an unfounded claim, but a postponement of the prosecution of the suit.

(a) 3 D. & L. 318; 15 L. J. (Q. B.) 4.  
(c) 3 D. & L. 587; 2 C. B. 548.

(b) 1 B. & S. 559; 30 L. J. (Q. B.) 321.

*Pollock*, Q. C. (*Joyce* with him), contra. Forbearance to prosecute a groundless action affords no consideration capable of supporting a promise. It is admitted on the record that no money was due to the plaintiff from the Honduras Government, and if the declaration and plea are read together, it is clear that a cause of action does not exist. All the cases are consistent with this view except *Cook v. Wright* (a), and that case is distinguishable. There the question was not whether a sum of money was due to the plaintiff, but whether it was due from the defendant or another person; whereas here the question, before the contract declared on was made, was whether a sum of money was due to the plaintiff from the Honduras Government. In *Edwards v. Baugh* (b) the declaration was held bad because there was not any allegation that a debt was due, but merely that a dispute existed respecting it; and in *Wade v. Simeon* (c) it was held that forbearance to prosecute a groundless claim gave no benefit to the promisor, and imposed no detriment on the promisee.

*James*, Q. C., replied.

COCKBURN, C. J. Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain

(a) 3 D. & L. 318; 15 L. J. (Q. B.) 4. (b) 11 M. & W. 641. (c) 2 C. B. 548.  
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moneys were due to him from the Honduras Government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook v. Wright (a)*. In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say (b) that "the real consideration depends on the reality of the claim made, and the bona fides of the compromise." If the plaintiff's claim against the Honduras Government was not bona fide, this ought to have been alleged in the plea; but no such allegation appears.

MELLOR, J. I am of the same opinion. If the plaintiff's claim against the Honduras Government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred.

*Judgment for the Plaintiff.*

## LEASK v. SCOTT BROTHERS.

IN THE COURT OF APPEAL, MAY 5, 1877.

[*Reported in Law Reports, 2 Queen's Bench Division, 376.*]

INTERPLEADER action to try the right of the plaintiff as against the defendants to 100 bags of nuts.

At the trial before Field, J., at the London Michaelmas sittings, 1876, the following facts appeared in evidence:—On the 22nd of December, 1875, Geen, Stutchbury, & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the Trinidad, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday, the 1st of January, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between 10,000*l.* and 11,000*l.*, Mr. Geen applied to him for a further advance of 2000*l.* The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the plaintiff's cashier at once handed to Geen a

(a) 1 B. & S. 559, 570; 30 L. J. (Q. B.) 321, 324.

(b) 1 B. & S. at p. 570; 30 L. J. (Q. B.) at p. 324.

check for 2000*l*. On Tuesday, the 4th of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, 224*l*. 16*s*. 2*d*.; and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about 5000*l*. in performance of their promise on the Saturday to give the plaintiff cover. On Saturday, the 8th of January, Geen & Co. stopped payment. The Trinidad arrived off Liverpool on the 3rd of February, and the defendants sought to stop the nuts in transitu, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of this interpleader action.

In answer to questions by the judge, the jury found, that the plaintiff received the bill of lading honestly and fairly; that valuable consideration was given on the understanding of security being given; and that the security given was to secure the 2000*l*., and also the old account.

The learned judge, after argument, directed judgment to be entered for the defendants, being of opinion that the facts of the case brought it within the principle of *Rodger v. Comptoir d'Escompte de Paris* (a), affirmed by the decision of *Chartered Bank of India, &c. v. Henderson* (b).

April 16, 17. *Watkin Williams*, Q. C., moved to enter judgment for the plaintiff. Geen & Co. became the lawful holders of the bill of lading on its being handed to them by the defendants indorsed in blank, and on their accepting the defendants' draft at three months for the price, and the plaintiff became lawful holder on it being handed to him by Geen & Co. And according to the findings of the jury, the plaintiff was bona fide transferee for valuable consideration from the lawful holder of the bill of lading, and was, therefore, legally entitled to it as against the original vendor. This has been the law ever since the leading case of *Lickbarrow v. Mason* (c); and the distinction, as to past and present consideration, was first taken in *Rodger v. Comptoir d'Escompte de Paris* (a), and is not to be found in any other case, in the dicta of any judge, or in any text-writer. Moreover, the case of *Chartered Bank of India, &c. v. Henderson* (b), before the same tribunal, while it recognizes the previous decision, very much narrows its application, and the facts of the present case bring it within the later decision. For assuming that the existing debt alone would not have been sufficient consideration, being past, to give a valid title to the plaintiff; here the handing over of the bill of lading was in consequence of a binding contract made on the Saturday to give cover, which could have been enforced both at law and equity.

(a) Law Rep. 2 P. C. 393. (b) Law Rep. 5 P. C. 501. (c) 2 T. R. 63; 6 East, 21, n.

[LORD COLERIDGE, C. J. *Alliance Bank v. Broom* (a) is an authority that performance of the contract would have been decreed in equity.]

Moreover, although not expressed, it is clear that part of the consideration for giving cover was the forbearance in not taking proceedings to enforce the debt, and this is a continuing present consideration. The distinction, however, between past and present consideration is inconsistent with all the cases. [He then went through the judgment in *Rodger v. Comptoir d'Escompte de Paris* (b) at length, and referred to *Currie v. Misa* (c); *Lempriere v. Pasley* (d); *Holroyd v. Marshall* (e); *Meyerstein v. Barber* (f), citing Blackburn on Sale, pp. 297, 298; *Marie Joseph* (g).]

*R. E. Webster* (with him *Murphy*, Q. C.), for the defendants. [The arguments for the defendants are so fully given in the judgment of the Court that it is unnecessary to repeat them.]

*W. Williams*, Q. C., was heard.

*Cur. adv. vult.*

May 5. The judgment of the Court (Lord Coleridge, C. J., and Bramwell and Brett, L. JJ.), was delivered by

BRAMWELL, L. J. The defendants have stopped in transitu the goods the subject of this proceeding. They have done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such stoppage. Whether he has is the question. The facts are few, and as follows:—Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, the 1st of January, they applied to the plaintiff for a further advance, which he agreed to make on being first covered. Geen & Co. promised to give him cover (not naming anything in particular), and the plaintiff advanced them a further sum of 2000*l.*, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by the defendant to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favor of the plaintiff.

This being so, the plaintiff contended that he was a bona fide holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co., and their assignees, if they had become bankrupt, or any one

(a) 2 Dr. & Sm. 289; 34 L. J. (Ch.) 256.

(b) Law Rep. 2 P. C. 393.

(c) Law Rep. 10 Ex. 153, at p. 168.

(d) 2 T. R. 485.

(e) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

(f) Law Rep. 2 P. C. 674.

(g) Law Rep. 1 P. C. 219.

claiming through or against them, except the defendants, yet they, the defendants, had not lost their right to stop in transitu. That the right of stoppage in transitu is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading; that, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage in transitu. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper in transitu, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage in transitu should be lost.

Mr. Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr. Webster cited *Rodger v. Comptoir d'Escompte de Paris* (a) before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the ratio decidendi was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down, it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a bona fide transferee defeats the right of stoppage in transitu. It is true, no doubt, that opinions must be taken secundum subjectam materiam, but it is strange that no judge, no counsel, no writer ever guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then that not only is the case a novelty,

(a) Law Rep. 2 P. C. 393.

but it is a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject. More than that, in *Vertue v. Jewell* (a), where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable consideration so as to defeat the right of stoppage, he puts it not on the ground that the consideration was past, as was the fact, but on the ground that the transferee had notice of the transferor's insolvency. Further, it is noticeable that this point does not seem to have been mentioned in *Rodger v. Comptoir d'Escompte de Paris* (b) till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of bona fides. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said (c), "The general rule, so clearly stated and explained by Lord St. Leonards in the case of *Mangles v. Dixon* (d), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord St. Leonards said that in reference to a case where the title was to a chose in action, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger v. Comptoir d'Escompte de Paris* (e), a title to property in ownership, and to use the old expression, a legal right.

If, besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice Buller, in *Lickbarrow v. Mason* (f), apply to such a case as the one before us. Practically such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff, or not, was, no doubt, such an understanding that, if the plaintiff had taken proceedings against Geen & Co. the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out and been paid part of his debt with the price, the consideration would have sufficed, if the transaction was not colorable. If the plaintiff had said, "I cannot take this bill of lading safely, as the consideration would be past, do it with the broker next-door and give me his check," that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to

(a) 4 Camp. 31. (b) Law Rep. 2 P. C. at p. 403. (c) Law Rep. 2 P. C. at p. 405.  
(d) 3 H. L. C. 702. (e) Law Rep. 2 P. C. 393. (f) 2 T. R. 63, at p. 75.



consider whether specific performance would be decreed as to this document which was not specified to the plaintiff; but the case of *Alliance Bank v. Broom* (a) shows that a general performance would be decreed; and certainly an action would lie for not covering. Therefore the assignor for such consideration as this, always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co., in this particular case, had said that this bill of lading was coming forward, and they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no authority to show that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the Judicial Committee in *Rodger v. Comptoir d'Escompte de Paris* (b), or with the argument for the defendants. As to the judgment of Mr. Justice Field, it is enough to say that it proceeded wholly on that case and in deference to it.

We are of opinion that judgment should be reversed, and entered for the plaintiff.

*Judgment reversed and entered for the plaintiff.*

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SECTION V — UNREAL CONSIDERATION.\*

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TWEDDLE v. ATKINSON, *Executor of GUY Deceased.*

IN THE QUEEN'S BENCH, JUNE 7, 1861.

[Reported in 1 Best & Smith, 393.]

THE declaration stated that the plaintiff was the son of John Tweddle, deceased, and, before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said John Tweddle, in con-

(a) 2 Dr. & Sm. 289; 34 L. J. (Ch.) 253.

(b) Law Rep. 2 P. C. 393.

\* Ch. III, Sect. V, Finch.

sideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following, that is to say:

“ High Coniscliffe, July 11th, 1855.

“ Memorandum of an agreement made this day between William Guy, of &c., of the one part, and John Tweddle, of &c., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.

“ And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said 21st day of August, A. D. 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said William Guy or his executor: yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.”

Demurrer and joinder therein.

*Edward James*, for the defendant.—The plaintiff is a stranger to the agreement and to the consideration as stated in the declaration, and therefore cannot sue upon the contract. It is now settled that an action for breach of contract must be brought by the person from whom the consideration moved; *Price v. Easton* (a). (He was then stopped.)

(a) 4 B. & Ad. 433.

*Mellish*, for the plaintiff.—Admitting the general rule as stated by the other side, there is an exception in the case of contracts made by parents for the purpose of providing for their children. In *Dutton and Wife v. Poole* (a), affirmed in the Exchequer Chamber, a tenant in fee simple being about to cut down timber to raise a portion for his daughter, the defendant his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the daughter, and an action of assumpsit by the daughter and her husband was held to be well brought. [WIGHTMAN, J. In that case the promise was made before marriage. In this case the promise is post nuptial, and the whole consideration on both sides is between the two fathers.] The natural relationship between the father and the son constituted the father an agent for the son, in whose behalf and for whose benefit the contract was made, and therefore the latter may maintain an action upon it. [CROMPTON, J. Is the son so far a party to the contract that he may be sued as well as sue upon it? Where a consideration is required there must be mutuality. WIGHTMAN, J. This contract, so far as the son is concerned, is one sided.] The object of the contract, which was that the children should be provided for, will be accomplished if this action is maintainable: whereas if the right of action remains in the father it will be defeated, because the damages recovered in that action will be his assets. [CROMPTON, J. Your argument will lead to this, that the son might bring an action against the father on the ground of natural love and affection.] In *Bourne v. Mason* (b) two cases are cited which support this action. In *Sprat v. Agar*, in the King's Bench in 1658, one promised the father that in consideration that he would give his daughter in marriage with his son, he would settle so much land; after the marriage the son brought an action, and it was held maintainable. The other was the case of a promise to a physician that if he did such a cure he would give such a sum of money to himself and another to his daughter, and it was resolved the daughter might bring assumpsit, "Which cases," says the report, "the Court agreed;" and the reason assigned as to the latter is, "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." There is no modern case in which this question has been raised upon a contract between two fathers for the benefit of their children. [WIGHTMAN, J. If the father of the plaintiff had paid the 100*l.* which he promised, might not he have sued the father of the plaintiff's wife on his express promise?] According to the old cases he could not. When a father makes a contract for the benefit of his child, the law vests the contract in the child. In *Thomas v.* ——— (c) the defendant promised to a father that in con-

(a) 2 Lev. 210; 1 Vent. 318. Affirmed on error in the Exch. Ch. T. Raym. 302.

(b) 1 Vent. 6.

(c) Sty. 461.

sideration that he would surrender a copyhold to the defendant, the defendant would give unto his two daughters 20*l.* a-piece; and after verdict in an action upon the case brought by one of the daughters for breach of that promise, on motion for arresting the judgment on the ground that the two ought to have joined, it was held that the parties had distinct interests, and so each might bring an action.

*Edward James* was not called upon to reply.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason (a)*, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says

(a) 1 Ventr. 6.

that there is an exception ; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And *Dutton and Wife v. Poole* (a) was cited for this. We cannot overrule a decision of the Exchequer Chamber : but there is a distinct ground on which that case cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

*Judgment for the defendant.*

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EASTWOOD v. KENYON.

IN THE QUEEN'S BENCH, JANUARY 16, 1840.

[ *Reported in 11 Adolphus & Ellis, 438.* ]

ASSUMPSIT. The declaration stated, that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned : that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law surviving : that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death : which piece of land and cottages were at the time of his death mortgaged by him ; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law : that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased : that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff, executor as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof : that the estate of John Sutcliffe deceased having been in-

(a) 2 Lev. 210 ; 1 Ventr. 318. Affirmed on error in the Exch. Ch., T. Raym. 302.

sufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own moneys, and did advance, a large sum, to wit 140*l.*, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn: that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof: that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the control and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of 140*l.* to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the control and management of the property to the said agent on behalf of the said Sarah Sutcliffe: that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or reward whatsoever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said 140*l.* That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit &c., for moneys so expended and borrowed by him as aforesaid; and it also then appeared, that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed, and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not, nor would then or at any other time pay or discharge the amount &c., but wholly refused &c.

Plea *Non Assumpsit*.

On the trial before Patteson J., at the York Spring Assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and ought to have been in writing; on the other hand it was contended that such defence, if available at all, was not admissible under the plea of *non assumpsit*. The learned judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

*Cresswell*, in the following term, obtained a rule nisi according to the leave reserved, and also for arresting judgment on the ground that the declaration showed no consideration for the promise alleged. In Trinity Vacation, 1839 (*a*),

*Alexander* and *W. H. Watson* showed cause. The defence is not available under the general issue. [Upon this point, *Buttemere v. Hayes* (*b*), decided on the same day, was mentioned to the Court, and was considered conclusive.] Then, the promise is not within the statute, which requires a writing only where the promise is "to answer for the debt, default or miscarriages of another person." Here there is no other person in default, but the promise is to pay the amount to the plaintiff. [PATTESON, J. It is rather a promise to pay Blackburn; a promise to take up the bill.] In substance it is a promise to pay the plaintiff what he is liable to pay Blackburn. No case has yet decided that a promise to pay the promisee's own debt to a third person is within the statute, which evidently contemplates the debt or default of third persons. The same point might be made in every case of an implied promise to indemnify, as where the plaintiff accepts a bill for the defendant's accommodation, or where the drawer is sued on the default of the acceptor. It is said by Parke, J., in *Thomas v. Cook* (*c*), that if the plaintiff, at the request of the defendant, paid money to a third person, a promise to repay need not be in writing. In *Castling v. Aubert* (*d*), a contract to indemnify the plaintiff if he gave up a lien, was held not to be within the statute. *Williams v. Leper* (*e*), is to the same effect. *Green v. Cresswell* (*f*) may be relied on, where a promise to indemnify the plaintiff against the consequence of becoming bail for a third party was held to require a writing; but there the defendant made himself answerable for the default of another, and so came exactly within the words of the statute. Then, as to the consideration; it has been distinctly held, that a moral obligation will support an express promise. There must be something

(*a*) June 19th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.J.  
 (*b*) 5 M. & W. 456. The same point arose in *Williams v. Burgess*, 10 A. & E. 499; and *Jones v. Flint*, 10 A. & E. 753. (*c*) 8 B. & C. 728, 732. (*d*) 2 East, 325.  
 (*e*) 3 Burr. 1886. (*f*) 10 A. & E. 453. See also *Cresswell v. Wood*, *Id.* 460.

done by the plaintiff at the defendant's request, or an act done for the defendant's benefit must be ratified by an express promise to pay ; in either case, an action will lie. [COLERIDGE, J. How are we to know the difference between an express and an implied promise on the pleadings ? ] After verdict an express promise must be presumed. [COLERIDGE, J. The same question may arise on demurrer.] In *Lee v. Mugeridge* (a), executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. The same doctrine was upheld in *Seago v. Deane* (b), *Atkins v. Hill* (c), and in several other cases, cited in note to *Wennall v. Adney* (d). A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant, while she was under age, and where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

*Cresswell*, contra. The case is within the words, as well as the spirit and mischief of the statute. It is a promise to discharge the note. The words of the breach in the declaration all point at the note. If the defendant had paid Blackburn, could it have been contended that the promise was to pay the plaintiff ; and that the payment to Blackburn was no answer to an action by the plaintiff ? This is in truth a promise to pay Blackburn the debt due to him from the plaintiff, and it is not the less within the statute, because the promise is made to the plaintiff and not to Blackburn himself, for the act does not say to whom the promise is to be made. The case of an accommodation acceptor, and the other cases of implied promises to indemnify are not in point. They are either promises to pay the defendant's own debt, or they are cases of liability arising by operation of law, where no real promise is ever made or required, and which are, therefore, not within the mischief of the statute. In *Williams v. Leper* (e) and *Castling v. Aubert* (f), there was a purchase by the defendant from the plaintiff. In the former, the landlord's right of distress was bought ; in the latter, the plaintiff's lien on certain policies. Here the plaintiff has sold nothing to the defendant. Then as to the consideration : Suppose A. gives a parol guaranty to a tradesman to induce him to supply goods to another, can A. be made liable on a subsequent parol promise ? Such a construction would defeat the statute ; yet the case is in principle the same as the present, and the moral obligation much stronger. A promise may be evidence of a precedent request, but has no efficacy in itself. What is it that constitutes the moral obligation

(a) 5 Taunt. 36.  
(e) 3 Burr. 1886.

(b) 4 Bing. 459.  
(f) 2 East, 325.

(c) Cowp. 284.

(d) 3 B. & P. 247.



here? Not the expenditure on the estate, for no duty was cast on the plaintiff to lay out any thing on it, nor had he any right to interfere with the management; and if he had, the defendant had at that time no interest in it at all. If the honesty of the outlay causes the moral obligation, then it is indifferent whether it turned out profitable, or not, to the defendant or his wife. It would support a promise though the property had been damnified by it. If the benefit constitutes the consideration, then whenever a party benefits another against his will, a subsequent promise will be a ground of action. If it had appeared that the wife was liable at the time of her marriage, then the consequent liability of the defendant might have supported his promise; but no liability of the wife is stated, nor is it said that she promised in consideration of the premises. As to the agreement of the plaintiff to give up the control and management of the property, he had no right to either, and therefore nothing to give up; and if he had, it is not alleged to have been the consideration of the wife's promise. The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy, bankruptcy, and the Statute of Limitations; and these were the cases referred to by Lord Mansfield when he laid down the above doctrine. As a general rule, it cannot be supported; *Littlefield v. Shee* (a). The law is correctly laid down and the cases explained in the note to *Wennall v. Adney* (b).

*Cur. adv. vult.*

In this term (January 16th), the judgment of the Court was delivered by

LORD DENMAN, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of *Buttmere v. Hayes* (c), that this defence might be set up under the plea of *non assumpsit*.

The facts were that the plaintiff was liable to Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the prom-

(a) 2 B. & Ad. 811.

(b) 3 B. & P. 247. See also the argument of the Attorney-General in *Haigh v. Brooks*, 10 A. & E. 315, 316.

(c) 5 Mee. & W. 456.

ise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, whilst the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shown to the defendant who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney* (a), and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd v. Lee* (b); debts of bankrupts revived by subsequent promise after certificate; and similar

(a) 3 B. & P. 249.

(b) 1 Stra. 94.

cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. *Barnes v. Hedley* (a) decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge* (b) upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the Judges of this Court in *Cooper v. Martin* (c), where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 Bosanquet and Puller above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley* (a) is fully consistent with the doctrine in that note laid down. *Cooper v. Martin* (c) also when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough in giving his judgment says, "the plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury;" and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* (d) must however be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should however be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee* (e), tried by Gaselee, J., at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman

(a) 2 Taunt. 184.

(b) 5 Taunt. 36. On a previous suit in equity to declare the bond a charge on the separate estate of the testatrix, the Master of the Rolls had refused relief. S. C. 1 V. & B. 118. (c) 4 East, 76. (d) 5 Taunt. 36. (e) 2 B. & Ad. 811.

when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon." After time taken for deliberation this Court refused even a rule to show cause why the nonsuit should not be set aside. *Lee v. Muggeridge* (a) was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record, but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge* (a), where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* (a) spoke of Lord Mansfield as having considered the rule of nudum pactum as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* (b) shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield v. Shee* (c). Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society: one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* (d) shows that it would not have been sufficient), and the declaration really discloses nothing but

(a) 5 Taunt. 36. (b) 3 B. & P. 249. (c) 2 B. & Ad. 811. (d) 7 T. R. 348.

a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of *non assumpsit*.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

*Lampleigh v. Brathwait* (a) is selected by Mr. Smith (b) as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C. J., lays down that "a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by *Hunt v. Bate* (c), there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in *Townsend v. Hunt* (d), and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

*Rule to enter verdict for the defendant, discharged.*

*Rule to arrest judgment, absolute (e).*

(a) Hob. 105. (b) 1 Smith's Leading Cases, 67. (c) Dyer, 272 (a). (d) Cro. Car. 408. (e) The opinion ascribed to Lord Mansfield respecting the rule of *nudum pactum* appears to be not an unreasonable deduction from the cases of *Pillans v. Mierop*, 3 Burr. 1663; and *Williamson v. Losh*, reported from the paper books of Ashurst, J., in Chitty on Bills, 75, note (x), 9th ed. Both are commented on by the Lord C. B. Skynner, in *Rann v. Hughes*, 7 T. R. 350, note (a). See also Evan's General View of the Decisions of Lord Mansfield, vol. i, p. 422.

## HARTLEY v. PONSONBY.

IN THE QUEEN'S BENCH, JUNE 4, 1857.

*[Reported in 7 Ellis & Blackburn, 872.]*

THE first count of the declaration alleged that defendant promised plaintiff to pay to plaintiff in Liverpool 40*l.*, provided plaintiff would assist in taking the ship *Mobile* from the port of Port Philip in Australia to Bombay in the East Indies, with a crew of nineteen hands. Averment: that, before this suit, he performed all things on his part to be performed to entitle him to the payment of the said sum of 40*l.*, according to the terms and true intent and meaning of the said promise of defendant; of which defendant had notice: and a reasonable time for the payment thereof elapsed before this suit. Breach: that defendant had not paid the same or any part thereof.

Pleas. 1. Non assumpsit. 2. To first count: That, by virtue of certain ship's articles made and entered into between plaintiff and defendant, and signed by plaintiff, and which were in force at the times in the first count mentioned, plaintiff, at the times aforesaid, was bound, if required by defendant to perform, and defendant, at the said times, had a right to require plaintiff to perform, the matter mentioned or referred to in the said first count as the consideration for the supposed promise; and there was no consideration for defendant's making or performing the supposed promise.

Issues on these pleas.

On the trial, before Erle, J., at the London Sittings after last Hilary Term, it appeared that the defendant was captain of *The Mobile*, a ship of 1045 tons register. The plaintiff was a mariner in the ship. The mariners, by their articles, agreed to serve on board the ship "on a voyage from Liverpool to Port Philip, from thence (if required) to any ports and places in the Pacific Ocean, Indian or China Seas, or wherein freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom: or for a term not to exceed three years." The wages of the plaintiff were to be 3*l.* per month. The proper complement of men was thirty-six. The three years would expire in July, 1855.

The ship left Liverpool, and reached Port Philip in Australia on 9th October, 1852. While she was at Port Philip, seventeen of the crew refused to work, and were sent to prison. Among the remaining nineteen, there were only four or five able seamen. The master proposed to sail for Bombay; and, to induce the remaining crew to take the ship to Bombay, he promised to pay to some of them a sum in addition to their wages: and he gave to the plaintiff a written promise, which was as follows:

“PORT PHILIP, 18 October, 1852.

“I promise to pay, in Liverpool, to Robert Hartley the sum of forty pounds sterling, provided he assist in taking ship *Mobile* from this port to Bombay with a crew of nineteen hands.

“As witness my hand.”

(Signed) “HENRY PONSONBY.”

A similar note was given to eight other seamen. Contradictory evidence was given as to what passed between the defendant and the seamen at the time of this agreement being made, and as to the facility of hiring fresh seamen at Port Philip. The ship set sail for Bombay, where she arrived on 31st December, 1852. She encountered much rough weather on the voyage, in consequence of which, and of the shortness of hands, extraordinary labor fell upon the crew. At Bombay additional hands were taken on board. The *Mobile* sailed for Liverpool on 14th February, 1853, and arrived there on 14th June, 1853. The owners and the master refused to pay the seamen more than the wages originally contracted for: and this action was brought against the master for the 40%. Evidence was given as to the unfitness of so small a crew as nineteen to navigate the ship. The learned judge put three questions to the jury. First: Whether the defendant made the agreement voluntarily: to which the jury answered that he did so, and not by coercion; and that this was for the best interests of the owners. Secondly: whether the defendant could, by reasonable exertions, obtain more hands at Port Philip: to which the jury answered that he could not have done so at a reasonable price. Thirdly: whether it was unreasonable or unsafe to proceed on the voyage to Bombay with so few hands: to which the jury answered that they considered it unreasonable for a vessel of 1045 tons to proceed on that voyage with only nineteen hands. His Lordship then directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant.

*Knowles*, in last Easter Term, obtained a rule to show cause why a verdict should not be entered for the defendant, “on the ground that the finding of the jury amounted to a verdict for the defendant; or why a new trial should not be had between the parties, on the ground that the evidence given at the trial showed that the plaintiff was not entitled to recover.”

*Hugh Hill* and *C. Milward* now showed cause. It appears that the captain, at the time when he made the contract, was striving to persuade the crew to undertake a risk which they were not bound to undertake: a sufficient consideration therefore arises from their undertaking it. It is undoubtedly true that, if an irremediable emergency arises in the course of a voyage, as, for instance, if a large part of the crew are

washed overboard, the crew on board are bound to perform so much more of their ordinary duty as may have become necessary for the completion of the voyage; and a promise to pay them for the performance of such extraordinary duty would be without consideration, or contrary to the policy of the law. But that rule is inapplicable to a case when a British ship is in a British harbor, and, for want of a sufficient number of hands, is in fact unseaworthy. A refusal to put to sea in an unseaworthy ship is no desertion of the ship; that was ruled at Nisi Prius by Crowder, J. in a case of *Davidson v. Todhunter* (a). So, if a master, by unwarrantable severity, compel a seaman to quit the ship; *Limland v. Stephens* (b), *Edward v. Trevellick* (c). So, if the master do not supply the seamen with provisions; *The Castilia* (Stewart) (d); or if he alter the mariners' contract in respect of the voyage to be performed; *The Eliza* [Ireland] (e). The only question here is whether there was an irremediable emergency. Now there is nothing to show that, by waiting a reasonable time, a sufficiency of hands might not have been procured. The captain himself proposed the extra pay; which at any rate shows his view of the obligation of the seamen.

*Knowles* and *Aspland*, contra. The agreement of the captain cannot be considered to have been voluntary: the jury have indeed found that it was; which may be true in a vague and popular sense of the word: but, legally speaking, the refusal of the crew to proceed was a compulsion. [COLERIDGE, J. It should seem that, if the circumstances excused the crew from going to sea, they also excused the captain from going.] The case is like *Harris v. Carter* (f), where it was held that a seaman was not relieved from his duty, so as to enable him to make a fresh contract, by the desertion or discharge of some of the hands. [C. MILWARD. There the plaintiff failed because it could not be shown that the ship had become unseaworthy.] Here no more appears than that the desertion imposed additional labor on those who remain. *Harris v. Watson* (g) is an authority for the defendant; there the action was against the captain, as here. In *The Eliza* (Ireland) (h) the original contract was put an end to by the master. But in *The Araminta* (Feran) (i), where, upon some of the crew deserting at Geelong in Australia, the captain proposed to the remaining crew that they should take the ship on, she being then short-handed, for additional wages, to which they assented, it was held that such additional wages could not be contracted for, and that, if they were paid, they might be deducted from the wages due on the original contract.

LORD CAMPBELL, C. J. I think that this verdict should stand. The

(a) Liverpool Summer Assizes, 1855. (b) 3 Esp. 269. (c) 4 E. & B. 59.  
 (d) 1 Hag. Rep. Adm. 59. (e) 1 Hag. Rep. Adm. 182.  
 (f) 3 E. & B. 559. See *Stilk v. Myrick*, 2 Campb. 317. (g) 1 Peake's N. P. C. 72.  
 (h) 1 Hag. Rep. Adm. 182. (i) 1 Spinks' Ecc. & Adm. Rep. 224.



answer given by the jury to the third question imports to my mind that for the ship to go to sea with so few hands was dangerous to life. If so, it was not incumbent on the plaintiff to perform the work; and he was in the condition of a free man. There was therefore a consideration for the contract; and the captain made it without coercion. This is therefore a voluntary agreement upon sufficient consideration. This decision will not conflict with any former decisions. In *The Araminta (Feran)* (a) Dr. Lushington says: "I do not wish it to be inferred from anything I now say, that mariners, having completed the voyage outwards, are compellable to make the return voyage when the number of the crew is so small that risk of life may be incurred."

In *Harris v. Carter* (b) there was no such risk. As to the weight of evidence, the evidence was conflicting: but my brother Erle is not dissatisfied with the verdict.

COLERIDGE, J. I am of the same opinion, and for the same reasons. I understand the finding of the jury to be, that the ship was unseaworthy; and that, owing to the excessive labor which would be imposed, it was not reasonable to require the mariners to go to sea. If they were not bound to go, they were free to make a new contract: and the master was justified in hiring them on the best terms he could make. It may be that the plaintiff took advantage of his position to make a hard bargain; but there was no duress.

ERLE, J. I am of the same opinion. I was deeply impressed with the consequence of not holding the plaintiff liable to perform his original engagement. But there is a point of danger at which it becomes unreasonable for mariners to be required to go on. That is a question for a jury. The mariners, not being bound to go on, were to all intents and purposes free, and might make the best contract they could.

CROMPTON, J. The jury have found that this was a free bargain. As regards public policy, it would be very dangerous to lay down that, under all circumstances and at any risk of life, seamen are bound to proceed on a voyage. The jury have found in this case (and, I think, upon the evidence, correctly) that it was not reasonable to require the seamen to go on. Where, from a ship being short-handed, it would be unsafe for the seamen to go to sea, they become free to make any new contract that they like.

*Rule discharged.*

(a) Spinks' Ecc. & Adm. Rep. 229.

(b) 3 E. & B. 559.

## PINNEL'S CASE.

IN THE COMMON PLEAS, TRINITY TERM, 1602.

[Reported in 5 Coke's Reports, 117.]

PINNEL brought an action of debt on a bond against Cole of £16 for payment of £8 10s. the 11th day of Nov. 1600. The defendant pleaded that he at the instance of the Plaintiff, before the said day, *scilicet*, 1 Octob. Anno 44 *apud W. solvit querenti* £5 2s. 2d., *quas quidem* £5 2s. 2d. the Plaintiff accepted in full satisfaction of the £8 10s. And it was resolved by the whole Court, that payment of a lesser sum on the day in satisfaction of a greater cannot be in satisfaction for the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the Plaintiff for a greater sum. But the gift of a horse, hawk, or robe, &c. in satisfaction is good. For it shall be intended, that a horse, hawk, or robe, &c. might be more beneficial to the Plaintiff than the money, in respect of some circumstance, or otherwise the Plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the Plaintiff. But in the case at Bar it was resolved, that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole: for the expenses to pay it at York is sufficient satisfaction. But in this case the Plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by the law he ought) but pleaded the payment of part generally; and that the Plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender, and not by him who accepts it. And for this cause judgment was given for the Plaintiff.

See reader 26 H. 6, Barre 37, in debt on a bond of £10 the Defendant pleaded that one F. was bound by the said deed with him, and each in the whole, and that the Plaintiff had made an acquittance to F., bearing date before the obligation and delivered after, by which acquittance he did acknowledge himself to be paid 20 shillings in full satisfaction of the £10. And it was adjudged a good bar; for if a man acknowledges himself to be satisfied by deed, it is a good bar, without anything received.

## GODDARD AND SON v. O'BRIEN.

IN THE HIGH COURT OF JUSTICE, MARCH 27, 1882.

[Reported in *Law Reports*, 9 *Queen's Bench Division*, 37.]

CASE stated by the Judge of the Southwark County Court.

1. The action is brought to recover amongst other items, 25*l.* 7*s.* 9*d.*, balance of account for goods sold and delivered between the 6th of May, 1879, and the 26th of April, 1880.

2. On the 16th of August, 1880, the defendant was indebted to the plaintiffs, in the sum of 125*l.* 7*s.* 9*d.* for billiard table slates sold and delivered by them to him. On that day Mr. Newitt, a member of the plaintiffs' firm, met the defendant and agreed to accept the sum of 100*l.* in discharge of the said sum of 125*l.* 7*s.* 9*d.* The defendant thereupon gave to the plaintiffs a check for 100*l.* payable on demand, and the plaintiffs gave him a receipt in the following form,—“Received the sum of 100*l.* by check, which is to be in settlement of account of 125*l.* 7*s.* 9*d.*, on said check being honored. August 16th, 1880.” The check was duly honored. There was no consideration given by the defendant or received by the plaintiffs in satisfaction of the said sum of 125*l.* 7*s.* 9*d.*, other than the check for 100*l.*

5. The action was tried on the 2nd of December, 1881, and judgment was given for the defendant on the 12th of January, 1882; the judge holding that the payment to and acceptance by the plaintiffs of the check for 100*l.* in settlement of their claim for 125*l.* 7*s.* 9*d.* was a good accord and satisfaction, by reason of the check being a negotiable security, although the payment of 100*l.* in cash would not have been a good accord and satisfaction.

The questions for the opinion of the Court were,—first, whether the payment by the defendant to the plaintiffs of the check for 100*l.* in settlement of their debt of 125*l.* 7*s.* 9*d.* was a good accord and satisfaction of the whole of the plaintiffs' debt,—secondly, whether the plaintiffs were entitled to judgment for the 25*l.* 7*s.* 9*d.*

*Brown*, for the plaintiffs. This case falls within the rule laid down by Pratt, C. J., in *Cumber v. Wane* (a), that a debt is not satisfied by the receipt of a security of equal degree for a smaller sum. To make it enure as a satisfaction, there must be a collateral agreement that the lesser amount shall be received in satisfaction of the larger. The check here was not a negotiable instrument, nor was it received as such; it was accepted as cash conditionally on its being duly honored, as appears from the form of the receipt. The reason for the distinction between a payment in cash and a payment by a negotiable security is clearly stated by Alderson, B., in *Sibree v. Tripp* (b): “It is undoubtedly true that payment of a portion of a liquidated demand

(a) Str. 426.

(b) 15 M. &amp; W. 23, 37; 15 L. J. (Ex) 348.

in the same manner as the whole liquidated demand ought to be paid is *payment* only in part, because it is not one bargain, but two, viz. payment in part and an agreement, without consideration, to give up the residue. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value." And Parke, B., says (a): "It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be *satisfaction* of the whole. If the contract be by bond or covenant, it can be determined only by something of an equal or higher value: but, upon a mere simple contract, it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself." And further on: "Again, a sum of money payable at a different time is a good satisfaction of a larger sum payable at a future day: Com. Dig. Accord. (B. 2). In the present case (supposing it a liquidated demand), the satisfaction is by giving a different thing, not part of the sum itself, having different properties. It may be of equal value, but that we cannot enter into: it is sufficient that the parties have so agreed. The case of *Andrew v. Boughey* (b) is an authority in support of this view."

[HUDDLESTON, B. *Sibree v. Tripp* (c), if it does not overrule, is entirely inconsistent with *Cumber v. Wane* (d).]

This case is quite beside *Sibree v. Tripp* (c). There, there was a distinct consideration for the accord besides the giving of the new promissory notes and the acceptance of them by the defendant, viz. the putting an end to litigation between the parties. Here, the finding of the judge in par. 4 of the case is, that it was the money and not the check that was accepted in satisfaction. It was a conditional payment; and there was no consideration for the abandonment of the excess. The ruling was therefore wrong.

*Woodward*, for the defendant, was not heard.

GROVE, J. I am of opinion that the decision of the county court judge was right. The difficulty arose from the rule laid down in *Cumber v. Wane* (d). But that doctrine has been much qualified, and I am not sure that it has not been overruled. In *Sibree v. Tripp* (c) the judgments of Parke and Alderson, BB., are strong expressions of a contrary opinion. That case, in which it was held that the acceptance of a negotiable security for a smaller amount may be in law a satisfaction of a debt of a greater amount, is a direct authority that the giving of a negotiable security is not within the rule of *Cumber v. Wane* (d). That was a just and proper decision, and must govern this case. It is said that part of the consideration there was the putting an end to litigation between the parties. Non constat that there was not a stoppage of litigation here. It is further

(a) 15 M. & W. at p. 33. (b) Dyer, 75, a. (c) 15 M. & W. 23. (d) Str. 426.

said that the acceptance of the check here was conditional only. Possibly that might make the consideration of less value. To say that you may receive something which is not money,—a chattel, for instance, of inferior value,—but that you cannot receive money, is to my mind a very singular state of the law. I cannot see why the same reasoning should not apply to a chattel as to money. It is enough, however, to say that I think the decision of the county court judge was right.

HUDDLESTON, B. I am of the same opinion, and upon the ground upon which the county court judge decided this case, viz. that there was a good accord and satisfaction by reason of the check being a negotiable security. The doctrine of *Cumber v. Wane* (a), if not actually overruled, has been very much qualified. In the notes to that case in the 8th edition of Smith's Leading Cases, at p. 363, it is said: "In *Sibree v. Tripp* (b), the case of *Cumber v. Wane* (a) was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt, which was not negotiable." The rule cannot be better stated than it is in the same note, at p. 366: "The general doctrine in *Cumber v. Wane* (a), and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz. that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement." For these reasons, I am of opinion that this appeal must be dismissed, with costs.

*Judgment for the defendant.*

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### FITCH v. SUTTON.

IN THE KING'S BENCH, JUNE 4, 1804.

[Reported in 5 *East*, 230.]

THIS was an action of indebitatus assumpsit for goods sold and delivered. Plea, non assumpsit. At the trial before Heath, J. at the last Chelmsford assizes it was proved that the defendant was, prior to his insolvency, indebted to the plaintiff in 50*l.* for goods sold and delivered. That in consequence of his insolvency the defendant compounded with all his creditors, and paid them 7*s.* in the pound, and at

(a) Str. 423.

(b) 15 M. & W. 26.

the time of such payment to the plaintiff promised him to pay him the residue of his debt when he should be of ability so to do; which he was proved to have been before the action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, and dated 29th of March, 1802, for a composition of 7*s.* in the pound for his debt of 50*l.*, which he acknowledged to be in full of all claims and demands from the beginning of the world to that day: which receipt it was insisted was either a discharge of the promise, or otherwise that the promise itself was void, as having been made in fraud of the other creditors. But the plaintiff's counsel contended that the acceptance by a creditor of a less sum in satisfaction of a greater was no discharge of the debt, unless it were by deed; and they relied on the case of *Heathcote v. Crookshanks* (a). The learned Judge however, not having the case before him, directed the jury to find for the defendant, and saved the point for the plaintiff, if the authority should be found to support him. A rule nisi was accordingly obtained by Shepherd, Serjt. for setting aside the verdict, and having a new trial; against which

*Best*, Serjt. now showed cause, and admitting that accord without satisfaction was no defence to an antecedent demand, endeavored to distinguish this from the case of *Heathcote v. Crookshanks*, because there the composition agreed to be taken at one time by the creditor was afterwards refused to be accepted by him; it was accord without satisfaction; and the plea there only stated a tender and refusal; whereas here the composition was actually accepted by the plaintiff in satisfaction of his whole demand. But if that were otherwise, the plaintiff ought not to have declared upon the old cause of action for goods sold and delivered, which was done away by the receipt given in consideration of the composition received and the new promise; but he should have declared specially upon such new agreement, which was conditional for the payment of the residue when the defendant should be of ability. And he cited *Knight v. Cox* (b), where the creditor having accepted a composition and signed a release to the defendant, who in consideration thereof promised to pay him the entire debt; it was holden to be a good defence on non assumpsit for the original cause of action, which was for goods sold and delivered, and that the plaintiff ought to have declared specially upon the special promise.

LORD ELLENBOROUGH, C. J. In the last-mentioned case the original contract was extinguished by the release: but it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend that acceptance of 17*l.* 10*s.* is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquish-

(a) 2 Term Rep. 24. (b) Before Pemberton, C. J., in *Sussex*, 1682, Bull. N. P. 153.

ment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane* (a) that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument, in *Heathcote v. Crookshanks*, to have been denied to be law; and in confirmation of that Mr. Justice Buller afterwards referred to a case, (stated to be that of *Hardcastle v. Howard*, H. 26 Geo. 3); yet I cannot find any case of that sort, and none has been now referred to: on the contrary, the decision in *Cumber v. Wane* is directly supported by the authority of *Pinnel's Case* (b), which never appears to have been questioned.

The other Judges concurred; and Lawrence, J., referred to Co. Lit. 212, b. and to *Adams v. Tapling* (c), as confirmatory of the same doctrine: in the former of which it is laid down, that "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction."

*Rule absolute.*

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## GOOD v. CHEESMAN.

IN THE KING'S BENCH, MAY 4, 1831.

[Reported in 2 Barnewall & Adolphus, 328.]

**ASSUMPSIT** by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1830, it was proved, on behalf of the defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum:—"Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being un-

(a) *Stra.* 426.

(b) 5 *Rep.* 117.

(c) 4 *Mod.* 88.

able to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829." It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it ; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up ; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional 20% per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows : —“If you should see Mr. Wooldridge” (one of the creditors who signed) “to-day, I should be glad if you would endeavor to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome ; but, of course, I am anxious the thing should be settled.” Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge’s assent, or absolute ; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly,

*Scotland* now showed cause. The objection taken is, that the supposed agreement for forbearance in this case is an accord without satisfaction ; that the consideration for the plaintiff’s alleged promise to give time and take his debt by instalments having altogether failed, his engagement to that effect is no answer to the present action. But this is not a case of accord, strictly speaking ; nor is it to be governed by the rigid technical rules applicable to that subject. It is the substitution of a new contract, by which the creditors who are parties to it agree to suspend the remedy for the recovery of their respective demands. Such agreements have been supported in modern cases ; and there is a sufficient consideration ; for where several creditors join in an undertaking of this kind, it is a good consideration to each that the rest subscribe, and, in so doing, give up a part of their present



rights for the general advantage: and every one is bound unless he can show that the debtor has refused to fulfil the agreement. *Boothbey v. Sowden* (a). Here the first act in fulfilment of the contract, namely, the nomination of a trustee, was to be performed by the creditors; and this at all events ought to have been done before they could consider themselves as remitted to their former rights by any failure on the part of the debtor. *Tatlock v. Smith* (b). But no such failure has in fact been shown; for the defendant's letter, which was read at the trial on behalf of the plaintiff to prove that the defendant had abandoned the contract, proves the contrary. The ground on which a creditor, having joined with others in admitting the debtor to a composition, is precluded from afterwards suing him, is the fraud which would thereby be practised on the rest of the creditors. *Butler v. Rhodes* (c), *Wood v. Roberts* (d). The same principle may be deduced from *Cockshott v. Bennett* (e), and *Steinman v. Magnus* (f). It is true, in the present case, the agreement was not signed by the defendant; but his adoption of it is shown by his subsequent letter, and by his procuring the paper to be stamped.

*Follett*, contra. The main answer to this defence is, that the accord, if any, was without satisfaction, and the defendant was never released. The agreement of the four creditors was altogether executory, and nothing was done upon it: there is no ground, therefore, for arguing, as in some of the cases cited, that the plaintiff has induced others to join him in an *act*, from the consequence of which he now seeks to relieve himself individually. None of the creditors were bound unless the agreement was carried into effect. When accord and satisfaction are pleaded, it is quite usual to traverse the averment of acceptance; and this is a complete answer to the plea. Here no acceptance had, in fact, taken place before the action was brought; the creditors, therefore, were not bound; and while a bargain is in fieri any party may retract, if he has not as yet altered the situation of third persons. Where third parties are not affected, a creditor, agreeing by parol to take a less sum than his entire debt, is not thereby precluded from afterwards suing for the whole. In *Heathcote v. Crookshanks* (g) it was held that such an agreement among the creditors, not having been followed by actual acceptance, was not obligatory. [LITLEDAL, J. It was observed there by Buller, J., that no fund was appropriated for the payment of the debt; and that if the debtor had assigned over all his effects to a trustee for distribution among the creditors, that would have been a good consideration for a promise of forbearance. PARKE, J. It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did.] Still it

(a) 3 Campb. 175.

(b) 6 Bing. 339.

(c) 1 Esp. 236.

(d) 2 Stark. 417.

(e) 2 T. R. 763.

(f) 11 East, 390.

(g) 2 T. R. 24.

was a question discussed by the Court, whether an agreement to forbear, under such circumstances, was binding; and they thought it was not. Lord Ellenborough lays it down in *Steinman v. Magnus* (a), that, in the absence of fraud on other parties, a simple agreement by a creditor to accept less than his just demand will not bind him. The noncompletion of the agreement in the present case was the fault of the defendant; for, according to *Cranley v. Hillary* (b), (where Lord Ellenborough seemed inclined to reconsider his former opinion in *Boothbey v. Sowden* (c), the person to be discharged is bound to do the act which is to discharge him, and not the other party. It was his business to seek out the creditors, procure the nomination of a trustee, and tender the necessary securities. If the defendant, instead of the general issue, had pleaded accord and satisfaction, it would not have been sufficient to show a parol agreement by the plaintiff and other creditors to receive less than their demands; the defendant must have averred an execution by himself of an assignment or warrant of attorney, or something tantamount, in fulfilment of his part of the accord, and an acceptance by them: for "every accord ought to be full, perfect, and complete;" and "if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance." *Peytoe's Case* (d).

LORD TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agree-

(a) 11 East, 393. (b) 2 M. & S. 120. (c) 3 Camp. 175. (d) 9 Rep. 79, b.

ment, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks* (a). And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in Com. Dig. Accord. (B 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on

the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

*Rule discharged.*

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JOHN WESTON FOAKES . . . . . APPELLANT;  
AND  
JULIA BEER . . . . . RESPONDENT.

IN THE HOUSE OF LORDS, MAY 16, 1884.

[*Reported in Law Reports, 9 Appeal Cases, 605.*]

APPEAL from an order of the Court of Appeal (a).

On the 11th of August, 1875, the respondent recovered judgment against the appellant for £2077 17s. 2d. for debt and £13 1s. 10d. for costs. On the 21st of December, 1876 a memorandum of agreement was made and signed by the appellant and respondent in the following terms:—

“Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty’s High Court of Justice, Exchequer Division, for the sum of £2090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2090 19s. shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment.”

The respondent having in June, 1882, taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on the 1st of July, 1882 due upon the judgment.

At the trial of the issue before Cave, J. it was proved that the

whole sum of £2090 19s. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of the 21st of December, 1876, he undertook to pay and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin Williams and Mathew, JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett, M. R., Lindley and Fry, L. JJ.) reversed that decision and entered judgment for the respondent for the interest due, with costs (a).

March 31, April 1. *W. H. Holl*, Q. C., for the appellant :—

Apart from the doctrine of *Cumber v. Wane* (b) there is no reason in sense or law why the agreement should not be valid, and the creditor prevented from enforcing his judgment if the agreement be performed. It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moreover if a composition is accepted, friends, who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit, who is to say it is not? The doctrine of *Cumber v. Wane* (b) has been continually assailed, as in *Couldery v. Bartrum* by Jessel, M. R. (c). In the note to *Cumber v.*

(a) 11 Q. B. D. 221.

(b) 1 Str. 426.

(c) 19 Ch. D. 394, 399. "According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English Common Law. But, that being so, there came a class of arrangements between creditors and debtors, by which a debtor who was unable to pay in full offered a composition of something less in the pound. Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position that, if the creditors took less than their debts, he would have something over for himself and would exert himself to pay the dividend; whereas, if the creditors did not, they would get nothing, or less than nothing, if they incurred costs in endeavoring to get payment. Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration; then there would be satisfaction. Consequently, if the creditors came in and all agreed *inter se* to take 10s. in the pound, the agreement *inter se* supplied the additional consideration which was supposed to be necessary, and

*Wane* (a) (1 Smith L. C. 4th ed. p. 253, 8th ed. p. 367) which was written by J. W. Smith and never disapproved by any of the editors, including Willes and Keating, JJ., it is said "that its doctrine is founded upon vicious reasoning and false views of the office of a Court of Law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent the doctrine of *Cumber v. Wane* (a) embraces the exploded notion that in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established. Accordingly in modern times it has been, as appears by the preceding part of the note, subjected to modification in several instances." *Cumber v. Wane* (a) was decided on a ground now admitted to be erroneous, viz., that the satisfaction must be found by the Court to be reasonable. The Court cannot inquire into the adequacy of the consideration. *Reynolds v. Pinhowe* (b), which was not cited in *Cumber v. Wane* (a) nor in *Fitch v. Sutton* (c), decided that the saving of trouble was a sufficient consideration; "for it is a benefit unto him to have his debt without suit or charge." This decision was cited with approval by Littledale, J., in *Wilkinson v. Byers* (d). *Pinnet's Case* (e) was decided on a point of pleading: the dictum that payment of a smaller sum was no satisfaction of a larger, was extrajudicial, and overlooked all considerations of mercantile convenience, such as mentioned in *Reynolds v. Pinhowe* (b); and it is also noticeable that it was a case of a bond debt sought to be set aside by a parol agreement. It is every day practice for tradesmen to take less in satisfaction of a larger sum, and give discount, where there is neither custom nor right to take credit. The reasoning in *Heathcote v. Crookshanks* (f) and *Thomas v. Heathorne* (g) is inconsistent with later decisions: see *Sibree v. Tripp* (h), where a promissory note for a smaller sum was held a satisfaction of the debt, and *Curlewis v. Clarke* (i), a similar decision as to a bill. *Fitch v. Sutton* (c) will be cited contra, but is clearly wrong. The agreement to pay the respondent's nominee is good consideration. A check is sufficient consideration: *Goddard v. O'Brien* (j). It has often been held that a sheet of paper or a stick of sealing wax is a sufficient consideration. The result of the cases is that if *Cumber v. Wane* (a) be right, payment of a less sum than the debt due, by a bill, promissory note or check is a good discharge; but payment of such

the debts were satisfied—so satisfied, that, if one of the creditors obtained an unfair advantage, a Court of Equity actually interfered, and allowed the debtor to recover back the surplus from him, because he was not entitled to take from the debtor any thing more than the composition. The principle upon which the creditor was made to repay was, that his debt was satisfied, and that he had no right to take an unfair advantage." Ed.

(a) 1 Str. 426.

(b) Cro. Eliz. 429.

(c) 5 East, 230.

(d) 1 A. & E. 111.

(e) 5 Rep. 117 a.

(f) 2 T. R. 24.

(g) 2 B. & C. 477.

(h) 15 M. & W. 23, 37.

(i) 3 Ex. 375.

(j) 9 Q. B. D. 37.

less sum by sovereigns or Bank of England notes is not. Here the agreement is not to take less than the debt, but to give time for payment of the whole without interest. Mankind have never acted on the doctrine of *Cumber v. Wane* (*supra*), but the contrary; nay, few are aware of it. By overruling it the House will only declare the universal practice to be good law as well as good sense.

[EARL OF SELBORNE, L. C.:—Whatever may be the ultimate decision of this appeal the House is much indebted to Mr. Holl for his exceedingly able argument.]

*Winch* followed on the same side, and contended that on the true construction of the agreement no provision was made for interest.

*Bompas*, Q. C. (*Gaskell* with him) for the respondent:—

The agreement was not intended to and does not deprive the respondent of her right to interest. But if it does it is void for want of consideration. There is a strong current of authority that what the law implies as a duty is no consideration. Therefore where a debt is due part payment is no reason for giving up the residue. The doctrine is too well settled to be now overthrown: see a long list of authorities, among which it is enough to refer to *Dixon v. Adams* (a); *Richards v. Bartlet* (b); *Goring v. Goring* (c); *Geang v. Swaine* (d); *McManus v. Bark* (e); *Fitch v. Sutton* (f); *Adams v. Tapling* (g); *Down v. Hatcher* (h); *Evans v. Powis* (i). In the cases in which *Cumber v. Wane* (j) has been departed from, the Judges admit its principle, but distinguish the facts. *Goddard v. O'Brien* (k) was wrongly decided. It is contrary to public policy to make the performance of a legal duty a good consideration; see the cases on seamen's wages; *Stilk v. Myrick* (l); *Harris v. Watson* (m); *Newman v. Walters* (n); *Clutterbuck v. Coffin* (o); *Harris v. Carter* (p). Where law and practice are so well established this House will not now depart from them; see the observations in *Danford v. McAnulty* (q). The Court went even further than *Cumber v. Wane* (j) in *Lovelace v. Cocket* (r), where to an action on a bond for the payment of money at a certain day, a plea that the plaintiff at the day of payment accepted another bond for the payment of the money in satisfaction, was on demurrer "held to be a naughty plea, for one bond cannot overthrow another." And so in *Hawes v. Birch* (s) it was held that "one thing in action cannot be satisfaction for another thing in action."

*Holl*, Q. C., in reply:—

The cases about seamen's wages have always been based on questions of public policy; see *Harris v. Watson* (t). *Dixon v. Adams* (a)

(a) Cro. El. 538. (b) 1 Leon. 19. (c) Yelv. 10. (d) 1 Lut. W. C. P. 464, 466.  
 (e) Law Rep. 5 Ex. 65. (f) 5 East, 230. (g) 4 Mod. 88. (h) 10 A. & E. 121.  
 (i) 1 Ex. 601. (j) 1 Str. 426. (k) 9 Q. B. D. 37. (l) 2 Camp. 317.  
 (m) 1 Peake, 102. (n) 3 B. & P. 612. (o) 4 Scott, N. R. 509. (p) 3 E. & B. 559.  
 (q) 8 App. Cas. 463. (r) 1 Br. & Gold. 47. (s) 1 Br. & Gold. 71. (t) 1 Peake, 102.

was commented upon by Littledale, J. in *Wilkinson v. Byers* (a), *Richards v. Bartlet* (b) and *Geang v. Swaine* (c) were decided on the ground that a plea of accord without satisfaction is no bar. In *Down v. Hatcher* (d) no reason for the decision was given, and it was doubted by Parke, B. in *Cooper v. Parker* (e).

The House took time for consideration.

May 16. EARL OF SELBORNE, L. C. :—

My Lords, upon the construction of the agreement of the 21st of December, 1876, I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2090 19s." (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2090 19s., "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judg-

(a) 1 A. & E. 111.

(b) 1 Leon. 19.

(c) 1 Lutw. C. P. 464.

(d) 10 A. & E. 121.

(e) 15 C. B. 822, 828.



ment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* (a) in 1602, and repeated in his note to Littleton, sect. 344 (b), but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors. I prefer so to state the question instead of treating it (as it was put at the Bar) as depending on the authority of the case of *Cumber v. Wane* (c), decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber v. Wane* (c); and yet that the doctrine itself may be law, rightly recognized in *Cumber v. Wane* (c), and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially over-

(a) 5 Rep. 117 a.

(b) Co. Litt. 212 b.

(c) 1 Sm. L. C. 8th ed. 357.

ruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

The doctrine, as stated in *Pinnel's Case (supra)*, is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in *Coke Littleton*, 212 b., it is, "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether the consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to *Cumber v. Wane (a)*, which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp (b)*, *Curlewis v. Clark (c)* and *Goddard v. O'Brien (d)*) have proceeded upon the distinction, that by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unneces-

(a) 1 Sm. L. C. 8th ed. 366. (b) 15 M. & W. 23. (c) 3 Ex. 375. (d) 9 Q. B. D. 37.

sary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane* (a), is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but in some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed and the appeal dismissed, with costs, and I so move your Lordships (b).

*Order appealed from affirmed, and appeal dismissed with costs.*  
*Lords' Journals*, 16 May, 1884.

## SCOTSON AND OTHERS v. PEGG.

IN THE EXCHEQUER, JANUARY 28, 1861.

[Reported in 6 *Hurlstone & Norman*, 295.]

**DECLARATION.** For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the said promise by the defendant,—yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship, &c.

**Plea:** That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight

(a) 1 Sm. L. C. 8th ed. 366.

(b) The other judgments are omitted. Ed.

therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence until and at the time of the making of the said promise and the delivery of said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then further delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under, and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons, they, the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder.

*Dowdeswell* in support of the demurrer. The plea is bad. It admits a promise by the defendant to unload the coal at the rate of forty-nine tons a day; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue; but the plea was allowed on the authority of *Shadwell v. Shadwell*. This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson v. Solly (a)*.

The court then called on

*C. Pollock*, to support the plea. There is no consideration to support the promise. The plea shows that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract

with other persons, were bound to do. The charter-party only specifies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [MARTIN, B. You must establish this, that, if a person says to another, "The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a *nudum pactum*. In Black. Com., vol. ii. p. 450, it is said: "If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale." [WILDE, B. That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner."] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration. *Herring v. Dorrel* (a). So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B. in consideration of B's releasing A. out of custody, is void. *Atkinson v. Settree* (b). [WILDE, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. MARTIN, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you £1000 a year." Could not the contract be enforced?] There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [MARTIN, B. That proceeds on the ground of public policy. WILDE, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you, if you will do it," the performance is a valid consideration for the payment. MARTIN, B. If a builder was under a contract to finish a house on a particular day,

(a) 8 Dowl. P. C. 604.

(b) Willes, 482.

and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B. I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant in answer says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a considera-

tion for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

*Judgment for the plaintiffs (a).*

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SECTION VI.—EXECUTORY CONSIDERATION.\*

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NICHOLS v. RAYNBRED.

HILARY TERM, 1615.

[*Reported in Hobart, 88.*]

NICHOLS brought an assumpsit against Raynbred, declaring that, in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note, here the promises must be at one instant, for else they will be both *nuda pacta*.

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HARRISON v. CAGE AND HIS WIFE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1698.

[*Reported in 5 Modern, 411.*]

THIS is an action on the case, wherein the plaintiff declares that, in consideration the plaintiff would marry the defendant, the defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other defendant.

First, This action does not lie. Indeed it might be otherwise in the case of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in Anne Davis's Case (*b*), and in the case of a feoffment *causa matrimonii prælocuti*, which shows that there is a great difference between the two cases of a man and a woman; for

(a) Pollock, C. B., and Channell, B., were absent.

(b) 4 Rep. 16 b.

\* Ch. III, Sect. VI, Finch.

it is a breach of a woman's modesty to promise a man to marry him, but it is not for a man to promise a woman to marry her.

Secondly, Here is no time laid when this marriage was to be; and it may be still.

Thirdly, The consideration is ill; it is no more than "I will be your husband if you will be my wife;" it is no more than this, "I will be your master, and you shall be my servant."

Fourthly, It is not reasonable that a young woman should be caught into a promise.

*E contra.* The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the counsel on the other side has so mean an opinion of a good woman as to think that she is no advancement to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

HOLT, C. J. Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum*, or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii prælocuti*, that goes upon another reason, there being a feoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise; but here indeed she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c., for this makes the promise void; but it is otherwise of a precontract.

TURTON, J. There is as much reason for the one as for the other; and Halcomb's Case in Vaughan is plain.

ROKEBY, J. If a man be scandalized by words *per quod matrimonium amisit*, a good action lies; and why not in this case?

TURTON, J. This action is grounded on mutual promises.

HOLT, C. J. The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum*; so that her promise must be good to make his signify anything to her; and then if her promise be good, why should not a good action lie upon it?

*Judgment for the plaintiff.*



## LEES v. WHITCOMB.

IN THE COMMON PLEAS, JUNE 14, 1828.

[Reported in 5 Bingham, 34.]

**ASSUMPSIT.** The plaintiff declared, in the fourth count of his declaration, that in consideration the plaintiff, at the special instance and request of the defendant, would receive the defendant into his service, and cause her to be taught the trade and business of a dress-maker and milliner by the wife of the plaintiff, and the defendant agreed and undertook and faithfully promised the plaintiff to continue with the wife of the plaintiff for two years, from the 5th of June, 1826, for the purpose of learning the business.

Averment of the defendant's reception and instruction by the plaintiff's wife, and of her staying in his service till April 14, 1827. Breach, her refusal to remain in his service for the remainder of the period of two years.

In the fifth count the consideration was stated to be simply the receiving the defendant into his service, and the undertaking, to serve.

There were other counts; but these came nearest to the agreement between the parties, and were the only ones relied on. Plea, *non assumpsit*.

At the trial before Park, J., Middlesex sittings after Hilary term, the plaintiff, in support of his action, gave in evidence the following agreement, signed by the defendant:

"I hereby agree to remain with Mrs. Lees, of 302, Regent Street, for two years from the date hereof, for the purpose of learning the business of a dress-maker. As witness my hand this 5th day of June, 1826.

"AMELIA WHITCOMB."

No premium was paid by the defendant, who, on the day mentioned in the agreement, entered the plaintiff's house, and left him in April following, by which time she had made such progress in learning the business that her services were becoming valuable to the plaintiff. It appeared that dress-making and millinery were two distinct businesses.

On the part of the defendant it was objected, that there was no mutuality in the above agreement, and that, therefore, it was not binding on the defendant; that the plaintiff not having bound himself to teach, although the defendant had agreed to remain and learn, there was an entire absence of consideration for the defendant's agreement; and that the agreement given in evidence did not correspond with that set out in the declaration. The plaintiff was thereupon nonsuited,

with leave to move to set aside the nonsuit, and have a new trial.

*Taddy*, Serjt. moved accordingly, and a rule *nisi* having been granted.

*Wilde*, Serjt. showed cause.

The fifth count is not supported by the evidence, because a contract to serve is very different from a contract to learn. And there is no consideration on the face of the agreement to support the fourth, as there ought to be under the Statute of Frauds. *Wain v. Wartlers* (a), *Saunders v. Wakefield* (b), *Jenkins v. Reynolds* (c). The plaintiff does not bind himself to teach, nor is the agreement even signed by him as a party to be charged.

The Court here called on

*Taddy*. The defendant could not engage to learn without an implied engagement on the part of the plaintiff to teach, so that the consideration sufficiently appears in the engagement to learn. [*Per Curiam*. The fourth count alleges the consideration to be to teach the business of a dress-maker and milliner; it was proved that the two businesses were distinct, and the writing put in evidence mentions only the business of a dress-maker.] But the word service as employed in the fifth count is usually and properly applied on the relation between master and apprentice, *Rex v. Lynn* (d), and therefore includes the required consideration of the teaching, and gives sufficient mutuality to the contract. As to the omission of the plaintiff's signature, it is sufficient if a memorandum of a bargain be signed by one of the parties to the contract; *Egerton v. Matthews* (e).

BEST, C. J. I am of opinion that none of the counts are proved. The contract does not bear the meaning which is put upon it in the declaration. The businesses of milliner and dress-maker are very different, and that disposes of the fourth count. The fifth count alleges the consideration to be the plaintiff's receiving the defendant into his service, and the undertaking, an engagement to serve; but there is by the contract no obligation on the defendant to serve; her engagement is merely to remain for two years; and the plaintiff could not have compelled her to serve. It was probably the plaintiff's intention to prevent the defendant from leaving him and setting up for herself the moment she had learned his business, and there might have been a sufficient consideration for that if he had undertaken to teach; but there is nothing in the agreement to insure such instruction to the defendant.

BURROUGH, J. There is no consideration expressed in the agree-

(a) 5 East, 10.  
(e) 6 East, 306.

(b) 4 B. & A. 595.

(c) 3 B. & B. 14.

(d) 6 B. & C. 97.

ment for the defendant's undertaking; and since the case of *Wain v. Warlters* that is indispensable.

GASELEE, J. The service in the fifth count is alleged generally, and not as a service for the purpose of learning. I feel some difficulty, but not sufficient to render it necessary for me to differ from the rest of the Court.

*Rule discharged.*

## HOADLY v. M'LAINÉ.

IN THE COMMON PLEAS, APRIL 19, 1834.

[Reported in 10 Bingham, 482.]

THIS was an action against the defendant, for not accepting a landaulet made to his order by the plaintiff.

The order, which was in writing, and delivered to the plaintiff on the 15th of May, 1832, was as follows:—

“Sir Archibald M'Laine orders Mr. Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments;”—[here followed a minute detail of various small matters, to which the proprietors of such vehicles attach importance;]—“the whole to be ready by the 1st of March, 1833.”

The carriage was completed by the time agreed on; but, in the course of its construction, a great number of alterations and additions were made from time to time at the request of the defendant.

In April, 1833, the defendant wrote to the plaintiff, desiring that he would send his bill for the carriage, and announcing the defendant's intention to have it out immediately. The bill, however, amounting to 480*l.*, the defendant refused to pay it, or to accept the carriage. Whereupon, the plaintiff brought the present action, and a great number of coachmakers having proved that the landaulet was of such exquisite workmanship, and so highly ornamented, as to be cheap at the price demanded, the jury gave a verdict for the plaintiff, with 200*l.* damages.

*Jones*, Serjt. obtained a rule *nisi* to set aside this verdict, on the ground, first, that the order of May 15, 1832, being silent as to price, there was no sufficient note or memorandum of the contract under the seventeenth section of the Statute of Frauds, and the 9 G. 4, c. 14. In *Elmore v. Kingscote* (a), the Court said, “there must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it

would let in much of the mischief which it was the object of the statute to prevent."—Secondly, that, considering the alterations and additions which had been agreed to while the vehicle was in the course of construction, the contract proved did not coincide with the contract of the 15th of May, 1832, which was the only one set out in the declaration.

*Wilde and Coleridge*, Serjts., showed cause. The note is sufficient; for the statutes require only a memorandum of what was agreed, not a memorandum also of what was not. In *Kenworthy v. Scofield* (a), Bayley, J., says:—"The word bargain means the terms upon which parties contract; and it appears by *Saunderson v. Jackson* (b), that, in order to satisfy the statute, the signature must either be to some written document, containing in itself the terms of the bargain, or connected with some other document which does." Where a definite price for the article has been agreed on, as in *Elmore v. Kingscote*, the memorandum of the bargain should state the price; and the decision and language of the Court in that case turn on the fact, that the definite price, which was part of the bargain, had been omitted in the memorandum. But a bargain made without specification of price is as valid as any other; where it is so concluded, no price can be specified in the memorandum; but the memorandum disclosing the whole that has been reduced to certainty, is sufficient to satisfy the statute. And all the writings which relate to the contract may be taken together, to show what the contract was; *Saunderson v. Jackson* (b). Here, taking the defendant's letter of April, 1883, in conjunction with his order of May, 1832, it is clear that no specific price was contracted for, but that the carriage was to be built at a reasonable price; else why does the defendant desire the plaintiff to send in his bill? In a case like this before the statute, where no specific price had been fixed, parol evidence might have been adduced to show what was a reasonable price, because where no price has been fixed the law implies that the party shall pay a reasonable price; and in the memorandum required by the statute it is not necessary to state what the law implies. *Egerton v. Mathews* (c). In the various decisions on the fourth section of the Statute of Frauds, which has been more strictly construed than the seventeenth, the specification of price has never been insisted on; and as a large proportion of contracts are necessarily entered into without such specification, the inconvenience of requiring it would be intolerable. In *Newbury v. Armstrong* (d), Tindal, C. J., says:—"We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most

(a) 2 B. & C. 947. (b) 2 B. & P. 238. (c) 6 East, 306. (d) 6 Bing. 201.

common intercourse of life." And Burrough, J. says:—"Whatever is necessarily implied, may be taken to be in the instrument."

With respect to the alleged variance, it would be impossible to carry on business in many departments of trade, as that of tailors, upholsterers, builders, and the like, if every alteration or addition in the progress of an executory contract were to be held to constitute a new and substantive bargain, to be void unless evidenced by a new memorandum.

*Atcherley, Serjt. (late Jones).* The cases on the fourth section of the Statute of Frauds may be dismissed on the consideration of the present question, because the difficulty with respect to executory contracts never arose till by the 9 G. 4, c. 14, s. 7, after reciting the enactments of 29 Car. 2, c. 3, s. 17, it was enacted, "That the said enactments shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The passing of that statute has rendered it necessary to introduce into the memorandum of executory contracts as much precision as is required in the memorandum of contracts for goods ready to be delivered. The object of requiring that precision was to prevent attempts to alter the terms of a contract by perjury; an attempt that can never succeed where all the material terms are evidenced by writing. But price is of all the ingredients of a bargain the most important; and to leave executory contracts open in this respect is to afford temptation and facility for the mischief which the Statute of Frauds seeks to prevent. A specific price ought, therefore, to be agreed on and expressed on the face of the memorandum; and if it be agreed on and not expressed—which, for aught that appears, might have been the case here—the omission to note it in the memorandum of the bargain affords as wide an opening for perjury as if there had been no memorandum at all. The dictum of the Court in *Elmore v. Kingscote* is general and unqualified. And the objection with respect to the variance remains unanswered; for the carriage, in respect of which the plaintiff has given evidence, is so different from the carriage described in the order of May, 1832, that it could only be the result of an entirely new contract, and on that new contract the plaintiff should have declared.

TINDAL, C. J. This is an action against the defendant for not accepting a carriage built pursuant to his order; and the question depends upon the construction to be put on the statute 9 G. 4, c. 14, s. 7, which extends to executory contracts the enactments of the 29 Car. 2, c. 3, s.

17, as to executed contracts for sale of goods, by providing, "that the said enactments shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The same construction, therefore, must be put on the one act as on the other; but the extreme accuracy of mind of the framer of the latter act is shown in this, that while the Statute of Frauds, in its enactments touching contracts for the sale of goods, employs the word price, the framer of the latter act has substituted the word value, so that, where the parties have omitted to fix a price, it may be open to a jury to ascertain the value in dispute.

The question therefore is, whether the order of May, 1832, is a sufficient note or memorandum of the bargain between these parties, within the seventeenth section of the Statute of Frauds; and I am of opinion it is.

It is clear that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth. This is no new doctrine; for in Blackstone's Commentaries, b. 2, c. 30, it is laid down, that "express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods;—implied, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform:—As, if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value."—"A contract for any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law."—"These valuable considerations are divided by the civilians into four species.—The third species of consideration is, *facio, ut des*, when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value on it."

What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth.

It has been contended, that this would open a door for perjury, and let in the mischief which the Statute of Frauds proposes to exclude. But I cannot agree in that proposition; for it does not appear that any specific price was agreed on; and if it had appeared that such was the

case, this note would not have been evidence of such a bargain, as the case of *Elmore v. Kingscote* expressly decides.

Thus the law stands on the note or memorandum of May, 1832. But we may look at all the writings to see what the contract was; and here, from the defendant's letter of April, 1833, it appears that, after he had seen the carriage, he desired the plaintiff to send in his bill. He must have known whether he had contracted for a stipulated price or not; and it may therefore be inferred, from this letter, that he knew he was to pay the reasonable charge when the article was made up.

Taking the whole together, there can be no doubt that here is a sufficient note or memorandum of the bargain, and therefore the rule must be discharged.

PARK, J. This is a case within the statute 9 G. 4, c. 14, s. 7, by which the provisions of the Statute of Frauds are extended to executory contracts. But the construction to be put on the one act is the same as on the other. Now it is only necessary that price should be mentioned in the memorandum when price is one of the ingredients of the bargain: the dicta in *Elmore v. Kingscote* are applied to the facts of that case, in which the bargain was for a specific price; and it is admitted on all hands that, if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient.

The Court says, "there must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent." That is, the price which had there been agreed on. Therefore we are far from impeaching the decision in *Elmore v. Kingscote*. "Although it be admitted," says the Court in *Saunderson v. Jackson*, "that the letter, which does not state the terms of the agreement, would not alone have been sufficient; yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given." That comes home directly to the present case; for the defendant's letter, referring to the article which was the subject of the contract, says, "Send me my bill. I shall bring out the carriage immediately." Putting the two writings together, it is impossible to say he did not undertake to pay on a *quantum meruit*.

GASELEE, J. Upon this contract, followed up as it is by the defendant's letter, no doubt can be entertained. But, independently of that, unless we establish as a general principle that every alteration introduced in the progress of an executory contract is to constitute a distinct

bargain, requiring a distinct note in writing, I am of opinion, that there is no variance in this case, and that there has been a sufficient memorandum of the contract. If we were to hold otherwise, every building contract would be avoided by every addition. With respect to price, the parties could not put down what was not settled; and as the memorandum contains all the terms of the bargain as far as the parties had agreed on it at the time, I am of opinion it is sufficient to bind the defendant.

BOSANQUET, J. I am of the same opinion. The questions to be decided are two. First, whether there has been any sufficient note or memorandum of the bargain for this carriage; secondly, whether the bargain was for such a carriage as that described in the note which has been produced.

The objection to the sufficiency of the note is, that it does not express the price to be paid for the carriage; and the language of the statute 9 G. 4, c. 14, which puts executory contracts on the same footing as executed contracts under the Statute of Frauds, so nearly corresponds with the language of the Statute of Frauds, that the one statute must receive the same construction as the other: if price be a necessary ingredient in a memorandum under the Statute of Frauds, so it is under the later statute. Now the Statute of Frauds requires a note or memorandum of the terms of the bargain: but that is all: a party is not bound to go beyond what he has agreed on and signed; his antagonist is not allowed to set up a price which has not been agreed on; and that is the result of the case of *Elmore v. Kingscote*, where a specific price having been agreed on, the vendor was not allowed to proceed upon a *quantum meruit*; and, according to the same principle, a party cannot insist on a specific price where none has been agreed on. If so, the question is, whether such a bargain is one that could have been enforced before the Statute of Frauds; and without doubt it could have been so enforced. Now that statute requires no more than that the bargain, such as it is, should be reduced to writing; and that having been done here, the first objection falls to the ground.

Then, secondly, did the order produced in evidence constitute the contract for the carriage which the defendant rejected? Taking it in conjunction with the defendant's letter, written after he had seen the carriage complete, and desiring his bill for the same, it is clear that the carriage was the result of that contract. It seems to me, therefore, that there is no variance, and there being a sufficient memorandum of the bargain under the Statute of Frauds, the rule must be discharged.

*Rule discharged.*



## SECTION VII.—EXECUTED CONSIDERATION.\*

## SIDENHAM v. WORLINGTON.

IN THE COMMON PLEAS, EASTER TERM, 1585.

[ *Reported in 2 Leonard, 224.* ]

IN an action upon the case upon a promise, the plaintiff declared that he at the request of the defendant was surety and bail for J. S., who was arrested in the King's Bench upon an action of £30, and that afterwards, for the default of J. S., he was constrained to pay the £30; after which the defendant, meeting with the plaintiff, promised him for the same consideration that he would repay that £30, which he did not pay; upon which the plaintiff brought the action. The defendant pleaded *non assumpsit*, upon which issue was joined, which was found for the plaintiff. *Walmesley*, Serjt., for the defendant, moved the court that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration: as if one giveth me a horse, and a month after I promised him £10 for the said horse, he shall never have debt for the £10, nor assumpsit upon that promise; for there it is neither contract nor consideration, because the same is executed. *ANDERSON*. This action will not lie; for it is but a bare agreement and *nudum pactum*, because the contract was determined, and not *in esse* at the time of the promise; but he said it is otherwise upon a consideration of marriage of one of his cousins, for marriage is always a present consideration. *WINDHAM* agreed with *ANDERSON*, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold. *PERIAM, J.*, conceived that the action did well lie; and he said that this case is not like unto the cases which have been put of the other side: for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration and the promise and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite ought to concur and meet together, viz., the consideration of the one side, and the sale or the promise on the other side. But to maintain an action upon an assumpsit, the same is not requisite, for it is suffi-

\* Ch. III, Sect. VII, Finch.

cient if there be a moving cause or consideration precedent ; for which cause or consideration the promise was made ; and such is the common practice at this day. For in an action upon the case upon a promise, the declaration is laid that the defendant for and in consideration of £20 to him paid (*postea scil.*), that is to say, at a day after *super se assumpsit*, and that is good ; and yet there the consideration is laid to be executed. And he said that the case in Dyer, 10 Eliz. 272, would prove the case. For there the case was, that the apprentice of one Hunt was arrested when his master Hunt was in the country, and one Baker, one of the neighbors of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt. Afterwards Hunt, the master, returning out of the country, thanked Baker for his neighborly kindness to his apprentice, and promised him that he would repay him the sum which he had paid for his servant and apprentice : and afterwards, upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case it was holden by all the justices that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. RHODES, J., agreed with PERIAM ; and he said that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him £20 for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration ; but if a servant hath wages given him, and his master *ex abundanti* doth promise him £10 more after his service ended, he shall not maintain an action for that £10 upon the said promise ; for there is not any new cause or consideration preceding the promise ; which difference was agreed by all the justices ; and afterwards, upon good and long advice and consideration had of the principal case, judgment was given for the plaintiff ; and they much relied upon the case of Hunt and Baker, 10 Eliz., Dyer, 272.

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#### ENGLAND v. DAVIDSON.

IN THE QUEEN'S BENCH, MAY 5, 1840.

[Reported in 11 *Adolphus & Ellis*, 856.]

ASSUMPSIT. The declaration stated that heretofore, to wit, &c., the defendant caused to be published a certain hand bill, placard, or adver-

tisement, headed "Fifty pounds reward ;" whereby, after reciting that, late on the night of &c., the mansion house of defendant, at &c., was feloniously entered by three men, who effected their escape, that two men had been taken into custody on suspicion of having been concerned in the felony, and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, &c., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward : that plaintiff, confiding &c., did afterwards, to wit on &c., give such information as led to the conviction of one of the said offenders, to wit one David Robson ; and that afterwards, to wit at the assizes for Northumberland, D. R., who was guilty of the said offence, to wit the feloniously entering &c., was in due course of law convicted of the said offence of feloniously entering &c., in consequence of such information so given by plaintiff ; of all which said several premises defendant afterwards, to wit on &c., had notice, and was then requested by plaintiff to pay him the said sum of 50*l.* ; and defendant afterwards, to wit on &c., in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.* : breach, that, although defendant, in part performance of his said promise and undertaking, to wit on &c., did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet &c. (breach, non-payment of the residue.)

Third plea. That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate, and the said offence was committed ; and it then was the duty of plaintiff, as such constable and police officer, to have given, and to give every information which might lead to the conviction of the said offender, and to apprehend him and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf : that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer, Hexham, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever : and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer, assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

*Ingham* now appeared for the plaintiff : but the Court called on *Martin*, for the defendant. No consideration is shown on this

record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons; Com. Dig. Leet, (M 9), (M 10); Justices of Peace, (B 79). It has been laid down that a sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract; *Harris v. Watson*, (a) explained by Lord Ellenborough in *Stilk v. Myrick* (b). The principle was recognized in *Newman v. Walters*, (c) where the case of a passenger was distinguished. [COLERIDGE, J. Those cases turn merely on the nature of the contract made by the sailor.] If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The cases on the subject of consideration are collected in note (b) to *Barber v. Fox* (d). [Ingham. The constable was not bound to procure evidence.] The contract here declared upon is against public policy.

LORD DENMAN, C. J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

LITLEDALE, PATTESON, and COLERIDGE, JJ. concurred.

*Judgment for the defendant.*

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## ROSCORLA v. THOMAS.

IN THE QUEEN'S BENCH, MAY 30, 1842.

[Reported in 3 Queen's Bench Reports, 234.]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit &c., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price &c., to wit &c., defendant promised plaintiff that the said horse did not exceed five years old, and was sound &c., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby &c.

Pleas: 1. Non assumpsit. Issue thereon.

(a) Peake, N. P. C. 72.

(b) 2 Camp. 317, s. c. 6 Esp. 129.

(c) 3 B. & P. 612.

(d) 2 Wms. Saund. 137 c. See also *Jones v. Waite*, 5 New Ca. 341, 351, 356; *Haigh v. Brooks*, 10 A. & E. 309.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner &c.: conclusion to the country. Issue thereon (a).

On the trial, before Wightman, J., at the Cornwall Spring assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter term, 1841, Bompas, Serjt. obtained a rule nisi for arresting the judgment on the first count (b). In last term (c),

*Erle* and *Butt* showed cause. The objection is, that the first count states only a *nudum pactum*. But there is an executed consideration, which, with a request, will support a promise. Now the request need not be express: wherever the law will raise a promise, a request by the party promising will be implied; note (c) to *Osborne v. Rogers* (d). *Payne v. Wilson* (e) was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. In *Thornton v. Jenyns* (f) the declaration charged that in consideration that plaintiff had promised to defendant, defendant then promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown v. Crump* (g) was cited: but the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained (h).

*Bompas*, Serjt., and *Slade*, contra. The warranty ought to be given at the time of the sale: if made after, it is without consideration; 3 Blackst. Com. 166, Com. Dig. Action upon the Case for a Deceit (A. 11), *Roswell v. Vaughan* (i) *Pope v. Lewyns* (j). *Thornton v. Jenyns* (f) was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by law upon a sale; *Parkinson v. Lee* (k). Even an express promise without a legal consideration is invalid; *Collins v. Godefrey* (l). In *Hopkins v. Logan* (m) there was an executed consideration from which a promise to pay on request would have

(a) There were other counts, on which issues were joined and found for the defendant.

(b) The rule was also for entering a verdict, on the evidence, for the defendant; but on this the Court did not decide.

(c) April 28th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Wightman, JJ.

(d) 1 Wms. Saund. 264 a.

(e) 7 B. & C. 423.

(f) 1 Man. & G. 166.

(g) 1 Marsh. 567.

(h) It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that, if it were so, the evidence negated the declaration.

(i) Cro. Jac. 196.

(j) Cro. Jac. 630.

(k) 2 East, 314.

(l) 1 B. & Ad. 950.

(m) 5 M. & W. 241.

arisen: and it was holden that this did not support a promise to pay on a future day named. [PATTESON, J. referred to *Hunt v. Bate* (a), as cited in *Eastwood v. Kenyon* (b), and to *Lampleigh v. Brathwait* (c).]

*Cur. adv. vult.*

LORD DENMAN, C. J., in this term (May 30th), delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note 1 to *Wennall v. Adney* (d), and in the case of *Eastwood v. Kenyon* (e). They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

(a) 3 Dyer, 272 a.

(b) 11 A. & E. 438, 452.

(c) Hob. 105, 5th ed. See s. c., 1 Smith's Leading Cases, 67.

(d) 3 Bos. & Pul. 249.

(e) 11 A. & E. 438.

The rule for arresting the judgment upon the first count must therefore be made absolute.

*Rule absolute.*

## LAMPLEIGH v. BRATHWAIT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1615.

[Reported in *Hobart*, 105; 1 *Smith's Leading Cases*, 67.]

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait and declared, that whereas the defendant had feloniously slain one Patrick Mahume; the defendant, after the said felony done, instantly required the plaintiff to labor, and do his endeavor to obtain his pardon from the king, whereupon, the plaintiff, upon the same request, did, by all the means he could and many days' labor, do his endeavor to obtain the king's pardon for the said felony, *viz.* in riding and journeying at his own charges from London to Roiston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, *sc. &c.*, in consideration of the premises, the said defendant did promise the said plaintiff to give him 100*l.*, and that he had not, &c., to his damage 120*l.*

To this the defendant pleaded non assumpsit, and found for the plaintiff, damage 100*l.* It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear that he did anything towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother (Warburton), but myself and the other two Judges were of opinion for the plaintiff, and so he had judgment.

First, it was agreed, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind: for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz., Dyer, 272. Hunt and Bates. See *Oneley's Case*, 19 Eliz., Dyer, 355.

Then, as to the main point, it is first clear, that in this case upon the issue non assumpsit, all these points were to be proved by the plaintiff:

1. That the defendant had committed the felony, *prout, &c.*
2. Then that he requested the plaintiff's endeavor, *prout, &c.*
3. That thereupon the plaintiff made his proof, *prout, &c.*
4. That thereupon the defendant made his promise, *prout, &c.*

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found *ut supra* is a proof that he did his endeavor according to the request, for else the issue could not have been found : for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise. And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as, in consideration that you shall serve me a year, I will give you ten pounds, here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration ; yet it is a promise before, though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

Now if the service were not done, and yet the promise made, *prout*, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here, that it was neither required, nor promised, to obtain the pardon, but to do his endeavor to obtain it : the one was his end and the other his office.

Now then, he hath laid expressly, in general, that he did his endeavor to obtain it, *viz. in equitando*, &c., to obtain. Now then, clearly, the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the court ; and therefore, clearly, if upon the trial he could have proved no riding nor journeying, yet any other effectual endeavor according to the request would have served : and therefore, if the consideration had been, that he should endeavor in the future, so that he must have laid his endeavor expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavor, he must have traversed the endeavor in the general, not in the riding, &c. in the special ; which proves clearly, that is not the substance, and that the other endeavor would serve. This makes it clear, that though particulars ought to be set forth to the court, and those sufficient, which were not done, which might be cause of demurrer ; yet being but matter of form, and the substance in the general, which is herein the issue and verdict, it were cured by the verdict ; but the special is also well enough ; for all is laid down for the obtaining of the pardon which is within the request ; and therefore, suppose he had ridden to that pur-



pose, and Brathwait had died, or himself, before he could do any thing else, or that another had obtained the pardon before, or the like, yet the promise had holden.

And observe that case, 22 E. 4, 40. Condition of an Obligation, to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court. The reason whereof, given by Brian and Choke, is, that the plea there contains two parts, one a trial *per pais*, *scil.* the writing of the discharge, the other by the court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree, that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally : and then it was a demurrer, not an issue, as is here.

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### KAYE v. DUTTON.

IN THE COMMON PLEAS, JUNE 29, 1844.

[ *Reported in 7 Manning & Granger, 807.* ]

**ASSUMPSIT.** The first count of the declaration stated, that, by a certain agreement or instrument in writing made by the defendant, theretofore, to wit, on the 22nd of September, 1836,—after reciting that one Whitnall, in his life-time, released and assured by deeds of the 30th and 31st of May, 1832, his freehold dwelling-houses and hereditaments at Windsor, in Upper Parliament Street, in Toxteth Park, unto R. Rockliff and H. Bullen, their heirs and assigns, by way of mortgage, to secure the repayment of 3500*l.*; and also reciting that the said Rockliff and Bullen required the said Whitnall to obtain the plaintiff to join him in a bond as a collateral security further to secure the repayment of the said sum of 3500*l.* and interest: and also reciting that the defendant had, since the death of the said Whitnall, taken upon himself the management of the estate of the said Whitnall, and had paid to the said Rockliff and Bullen 3370*l.*; and also reciting that the said Bullen and Rockliff had called upon the plaintiff for payment of the said mortgage, and he was surety for the said Whitnall in the said bond, and that the plaintiff thereupon paid to the said Bullen and Rockliff the sum of 130*l.* on the 1st of May, 1835; and also reciting that the defendant had repaid the plaintiff the sum of 48*l.*, leaving due to him the sum of 82*l.*, and that such last-mentioned amount the defendant had agreed to repay to the plaintiff out of the moneys which might arise from the sale of the said hereditaments and premises when the same should be sold, and in the meantime to appropriate the rents of the said hereditaments and premises towards payment of the same sum, as the

plaintiff had a lien on the said hereditaments and premises for the said sum of 82*l.*; and also reciting that the defendant had requested the plaintiff to release and convey all his estate and interest in the said hereditaments and premises to Alison and Lenox, and that that he had already done, reserving to himself a lien on the said property as aforesaid—It was by the said agreement or instrument in writing witnessed, that, in consideration of the plaintiff's having paid to the said Bullen and Rockliff the said sum of 130*l.*, in part discharge of the said mortgage, and in consideration of the plaintiff's having released and conveyed all his estate and interest in the said hereditaments to Alison and Lenox (reserving to himself the said lien), and in order to secure to the plaintiff the repayment of the said sum of 82*l.*, he the defendant did thereby for himself undertake and agree with the plaintiff, his executors, administrators, and assigns, to pay to him or them the said sum of 82*l.*, with interest thereon, out of the proceeds to arise from the sale of the said hereditaments and premises, when the same should be sold, and, in the meantime, and until such sale was effected, to appropriate the rents of the said hereditaments and premises, in liquidation of the said sum so due to the plaintiff as aforesaid; as by the said agreement or instrument in writing, reference being thereunto had, will appear: Averment, that, the said agreement or instrument in writing being so made as aforesaid, he, the defendant, in consideration of the premises, afterwards; to wit, on the said 22nd of September, 1836, promised the plaintiff to observe and perform the said agreement or instrument in writing, in all things therein contained and on his the defendant's part to be observed and performed; that, after the said agreement or instrument in writing was made as aforesaid, and before the said sale therein mentioned was effected, to wit, on the 30th of September, 1836, and on divers other days between that day and the commencement of the suit, the defendant received the said rents in the said agreement or instrument mentioned, to a large amount, to wit, to the amount of 2000*l.*, which he could and might and ought, according to the said agreement or instrument in that behalf, to have appropriated in liquidation of, and which were sufficient to liquidate, the said sum of 82*l.* so due to the plaintiff as aforesaid; yet the defendant, disregarding the said agreement or instrument and his said promise, did not nor would, although theretofore, to wit, on the 1st of September, 1839, requested by the plaintiff so to do, appropriate the said rents so received by him as aforesaid, or any part thereof, in liquidation of the said sum of 82*l.*, so due to the plaintiff as aforesaid, or pay the same rents, or any part thereof, to the plaintiff on account, or in discharge, or part discharge, of that sum of money, or otherwise howsoever, but wholly refused so to do, and the last-mentioned sum of 82*l.* is still wholly unliquidated, and wholly due and unpaid to the plaintiff.

To this count the defendant pleaded amongst others two special pleas, to the replications to which he demurred specially. Upon the argument in Easter term last, however, the defendant abandoned the pleas, and objected to the declaration.

*Dowling*, Serjt., for the defendant. Three objections arise on the declaration: first, it discloses no consideration for the promise alleged; secondly, the consideration (if any) is a mere moral consideration; thirdly, the consideration being executed, it can only sustain an implied promise (a); whereas the promise alleged is a different one, being an express promise.

Construing the declaration most favorably for the plaintiff, it appears that he having become surety for Whitnall, the mortgagor, paid 130*l.* to the mortgagees; that the defendant—who had taken upon himself the management of Whitnall's estate,—had repaid him 48*l.*, and promised to pay him the residue out of the proceeds thereof; and that the plaintiff, at the request of the defendant, released and conveyed all his interest in the premises to Alison and Lenox, reserving to himself a lien on the property. This statement of facts does not disclose any consideration whatever for the defendant's promise. The only interest the plaintiff ever had in the premises was the lien, which entitled him, in equity, to stand in the position of the mortgagees. *Copis v. Middleton* (b). The recital that the defendant had released all his estate and interest in the property, except his lien, is in effect to say that he had released nothing. Possibly the consideration might have been good if it had been alleged that the plaintiff had executed some instrument purporting to convey an interest. In *Wilkinson v. Oliveira* (c), the declaration stated that, in consideration that the plaintiff, at the request of the defendant, had given the defendant a letter written by O., since deceased, by means of which letter the defendant was enabled to, and did, determine controversies, and obtain a large portion of O.'s effects, the defendant promised to give the plaintiff 1000*l.*: and it was held that the declaration disclosed a sufficient consideration to sustain an action on the promise. So here, if the declaration had stated that the plaintiff had executed an assignment, it might have been sufficient; but the only consideration alleged is, the assigning of his interest; whereas he had none to convey.

Secondly. The only consideration that appears upon the face of the declaration (if any) is a mere moral consideration, to which the law will give no effect. A past consideration will not support a subsequent promise; *Jeremy v. Goochman* (d) *Baker v. Halifax* (e) *Docket v. Voyel* (f). The law does not, in truth, give effect to any but an executory (g) consideration. It may be said that the consideration here

(a) Quære.  
(d) Cro. Eliz. 442.  
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(b) Turn. & Russ. 224.  
(e) Ib. 741.

(g) i. e. executory in its inception.

(c) 1 N. C. 490, 1 Sc. 461.  
(f) Ib. 885.

is not simply an executed consideration, because it is stated that the defendant had requested the plaintiff to convey. But a mere request is of no avail. *Lampleigh v. Brathwait* (a). The promise alleged and the promise implied by law must be co-extensive. *Veitch v. Russell* (b). [TINDAL, C. J. That case shows that a subsequent express promise will not convert that into a debt which, of itself, was not a legal debt.] It establishes that an express promise cannot be supported by a moral consideration.

Thirdly. If the court think that any promise can be implied from the facts stated, it will not be the promise alleged. It is clear that an executed consideration will only sustain such a promise as the law will imply. *Brown v. Crump* (c). In *Granger v. Collins* (d), the declaration (in assumpsit) stated, that whereas before and at the time of making the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a term of years, and thereupon afterwards, to wit, on &c., agreed to let to the plaintiff, who then agreed to take of the defendant the said house and premises at a certain rent; and, in consideration of the premises, the defendant promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, without any eviction from the parties entitled to the reversion; nevertheless he the plaintiff was evicted by the party entitled to the reversion. The declaration was held bad on demurrer, inasmuch as the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid on the defendant's promise arose from that relation. So, in *Hopkins v. Logan* (e), it was held that an executed consideration, whereon the law implies a promise to pay on request (as, upon an account stated), is not sufficient to support a promise to pay at a future day. Parke, B., there said: "The promise which arises in law upon an account stated is, to pay on request, and any other promise is *nudum pactum*, unless made upon a new consideration." Alderson, B., said: "The consideration is clearly executed, and the promise which the law implies thereon is, to pay on request. In order to convert that promise into a promise to pay at a future day, there must be a new consideration." And Maule, B., said: "I agree, that an executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration." Here, the plaintiff must proceed on the promise implied by law; and if the court cannot imply any promise at all, or if it cannot imply the promise laid clearly, the declaration is bad. *Jackson v. Cobbin* (f). In *Roscorla v. Thomas* (g), the declaration (in assumpsit) stated that, theretofore, to wit, on the 29th of September,

(a) Hob. 105, Sir F. Moore, 866.

(b) 3 Q. B. 928, 3 G. &amp; D. 198.

(c) 1 Marsh. 567, 6 Taunt. 300.

(d) 6 M. &amp; W. 458. (e) 5 M. &amp; W. 241.

(f) 8 M. &amp; W. 790, 1 Dowl. (N. S.) 96.

(g) 3 Q. B. 234, 2 Gale &amp; D. 508.

1840, in consideration that the plaintiff at the request of the defendant had bought of the defendant a certain horse at a certain price, to wit, 30*l.* the defendant promised the plaintiff that the horse was sound and free from vice. It was held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of the sale the only implied promise was to deliver the horse on request, and that, after the sale, therefore, there was no consideration for the subsequent express promise of warranty.

*Channell*, Serjt., contra. The declaration is good. The defendant's promise being laid to have been made in consideration of the premises, that is, of all that is stated in the foregoing part of the declaration, it is submitted that the facts alleged disclose a sufficient legal consideration. Admitting that a mere moral consideration ordinarily will not sustain a promise, here a legal consideration is apparent. If the defendant had any estate or interest to convey, his parting with it at the defendant's request would be an ample consideration: and upon this declaration it is not competent for the defendant to say that the plaintiff did not release some interest in the mortgaged premises. Having paid money as surety for the mortgagor he would stand in his place, and if any interest can be inferred beyond the lien, there is a good consideration. The difficulty arises on the words "reserving to himself a lien on the said property." The fair meaning of that is, that the plaintiff had given up his lien so far as regarded Alison and Lenox, but preserved it as between himself and the defendant. As to the second point, the rule upon this subject is well laid down in 1 Wms. Saund. 264, n., where it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request by the party, either express or implied, at the time of performing the consideration; (a) but where there is an express request at the time, it will in all cases be sufficient to support a subsequent promise." Here, what is treated as a past consideration is stated to have been done because of the defendant's request. Cases have been cited to show that the past consideration here stated does not support the particular promise alleged in the declaration: but those cases are distinguishable: as, in all of them, the promise implied by law differed widely from that alleged on the face of the declaration. The question how far a moral consideration will support a subsequent express promise, is discussed by Lord Denman, in *Eastwood v. Kenyon*. (b) Here, looking at the

(a) 1 Man. & Gr. p. 266, n.

(b) 11 Ad. & E. 438, 3 P. & D. 276.

whole declaration, a sufficient consideration appears for the promise laid.

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court. This was a declaration in assumpsit upon a special agreement, to which the defendant pleaded, amongst others, two special pleas, namely, the fourth and fifth pleas, to which the plaintiff demurred; and the defendant demurred specially to the plaintiff's replication to the third plea. But it is unnecessary to advert to the particular state of the pleadings, as it was admitted by my brother Dowling, on the argument for the defendant, upon an objection taken to the fourth and fifth pleas, that he could not support those pleas, and the whole argument before us turned on the sufficiency of the declaration.

Two objections were made to the declaration—first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz. *Brown v. Crump* (a), *Granger v. Collins* (b), *Hopkins v. Logan* (c), *Jackson v. Cobbin* (d), and *Roscorla v. Thomas* (e), certainly support that proposition to this extent,—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate* (f), and several cases mentioned in the margin of the report of that case, seem to go to that extent: as also do some others collected in Roll. Abr. Action sur Case (Q) (g). But it is not necessary that we should pronounce any opinion upon that point; for, assuming it to be sufficiently

(a) 1 Marsh. 587, 6 Taunt. 300.

(b) 6 M. & W. 458.

(c) 5 M. & W. 241, 7 Dowl. 360.

(d) 8 M. & W. 790, 1 Dowl. (N. S.) 96.

(e) 3 Q. B. 234, 2 Gale & D. 508.

(f) Dyer, 272.

(g) 1 Roll. Abr. 11; translated, 1 Vin. Abr. 279.

alleged that the plaintiff released and conveyed his interest at the request of the defendant, yet it does not appear that he had any interest which passed by such release and conveyance. The declaration is founded on an agreement which recites that a certain estate had been mortgaged by one Whitnall, since deceased; and that the plaintiff had joined in a bond as a collateral security for the mortgage-money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the meantime to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff had a lien on the said premises. Thus far there is nothing to show that the plaintiff had any other interest than this lien. The agreement then recites that the defendant had requested the plaintiff to release and convey his interest to Alison and Lenox, and that he had done so, reserving to himself a lien on the property as aforesaid, that is, reserving to himself the only interest that he is shown to have had. The agreement then proceeds to state that, in consideration of the plaintiff having paid the money and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself the said lien, the defendant undertook and agreed, &c. Now, the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was again no consideration, for it does not appear that the plaintiff parted with any thing by it. For the plaintiff it was contended, that he must be taken to have parted with his lien on the property, reserving only his right to call upon the defendant to pay the residue still due to the plaintiff, out of the proceeds of the estate, when sold, and, in the meantime, to appropriate the rents to the same object. But we cannot put that construction upon the agreement, which expressly speaks of the lien reserved as the same lien which the plaintiff had before.

Such being in our judgment the effect of the agreement set out in the declaration, the case resembles that of *Edwards v. Baugh* (a). There, the declaration alleged that certain disputes and controversies were pending between the plaintiff and defendant, as to whether the defendant was indebted to the plaintiff in a certain sum of money; and that thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. On general demurrer, the declaration was held bad, because it did not allege that any debt was

(a) 11 M. & W. 641.

due from the defendant to the plaintiff, or that an action had been commenced for the recovery of any sum claimed. So, in the present case, as the declaration does not show that the plaintiff had any interest in the premises except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter. Our judgment must therefore be for the defendant.

*Judgment for the defendant.*

## VICTORS v. DAVIES.

IN THE EXCHEQUER, APRIL 22, 1844.

[Reported in 12 Meeson & Welsby, 758.]

**ASSUMPSIT.** The declaration stated, that the defendant, on the 6th of March, 1844, was indebted to the plaintiff in the sum of £10, for money lent by the plaintiff to the defendant.

Special demurrer, assigning the following causes:—"That it is not alleged in the declaration that the money was lent to the defendant at his request, and that therefore there is no consideration to support the promise; nor does it sufficiently appear that the defendant was indebted to the plaintiff.

*Pearson*, in support of the demurrer.—The declaration is insufficient for want of the averment that the money was lent to the defendant "at his request." [ALDERSON, B.,—How can there be a lender unless there be also a borrower?] A plaintiff is bound to allege a request, wherever the consideration is executed. In the notes to *Osborne v. Rogers* (a) it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration." And, in a note by the learned editors of the fifth edition, it is added, "So, even an affidavit (to hold to bail) of debt for money lent and for goods sold and delivered, and for work and labor, has been held irregular, because it omitted to state that it was 'at the instance and request of the defendant,' although it stated that it was 'to and for his use and on his account;'" for which they cite *Durnford v. Messiter* (b). In *Chitty on Pleading* (c), it is also said, "In each of these counts upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's request, though such request might, in some cases, be implied in evidence." [PARKE, B.—There is a very learned note of my Brother Manning on this subject (d),

(a) 1 Saund. 264, n. 1.

(b) 5 M. & Selw. 446.

(c) Vol. 1, p. 353, 7th ed.

(d) 1 Man. & Gr. 265.



in which he goes into the whole law with respect to alleging a request, and points out the error into which Mr. Serjeant Williams appears to have fallen in his comment upon *Osborne v. Rogers*. The note is thus: "The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In *Osborne v. Rogers*, the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labor in and about the business of the said William; and the declaration alleges, that Robert, confiding in the said promise of William, afterwards went into the service of William, and bestowed his care and labor in and about &c. Here the consideration is clearly executory, yet Mr. Serjeant Williams, in a note to the words 'at the special instance and request,' says, 'these words are necessary to be laid in the declaration, in order to support the action. It is held, that a consideration executed and past,—as, in the present case, the service performed by the plaintiff for the testator in his lifetime, for several years then past,—is not sufficient to maintain an assumpsit, unless it was moved by a precedent request, and so laid.' The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of, the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, at his request, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. Vide Rastall's Entries, tit. Dette; and Co. Ent., tit. 'Debt.'" There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid; because no man can be a debtor for money paid, unless it was paid at his request. What my Brother Manning says, in the note to which I have referred, is perfectly correct.]

POLLOCK, C. B.—There cannot be a doubt about this case; the statement that the money was lent implies that it was advanced at the request of the defendant. There must be judgment for the plaintiff.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

*Judgment for the plaintiff.*

## FLIGHT v. REED.

IN THE EXCHEQUER, JANUARY 21, 1863.

*[Reported in 1 Hurlstone & Coltman, 703.]*

DECLARATION on six bills of exchange, drawn in the years 1855 and 1856, by the plaintiff upon and accepted by the defendant.

Plea.—That before the making of the said bills of exchange in the declaration mentioned, or any or either of them, to wit, on the 31st day of October, A. D. 1845, it was corruptly and against the form of the statute in that behalf made and provided, agreed between the plaintiff and defendant, and one — Robinson, that the plaintiff should lend and advance to the defendant and the said — Robinson a certain sum of money, to wit, 1500*l.*, and that the plaintiff should forbear and give day of payment to the defendant and the said — Robinson, until a day then to come to wit, until the bills of exchange next hereinafter mentioned should become due and payable, and that for such forbearance the defendant and the said — Robinson should pay to the plaintiff more than lawful interest at the rate of 5*l.* per centum per annum, upon the said sums of money solent and forborne by the plaintiff to the defendant, that is to say 100*l.* And that for securing the repayment of the said sum of 1500*l.* and interest, the defendant and the said — Robinson should accept and deliver to the plaintiff certain bills of exchange, drawn by the plaintiff upon them, whereby they should engage to pay to the plaintiff or his order 1600*l.*, ten weeks after the date thereof and of the said loan. And the defendant further says, that in pursuance of the said unlawful agreement the plaintiff accordingly, to wit, on the day and year aforesaid, made the said loan and advance to the defendant, and the said — Robinson, and they then accordingly accepted bills of exchange, drawn by the plaintiff on them for the sum of 1600*l.*, payable as aforesaid. And that save as aforesaid there never was any consideration for the acceptance by the defendant of the said last mentioned bills of exchange, or any or either of them. And the defendant further says that the said bills were dishonored at maturity, and that the bills of exchange in the declaration mentioned were accepted and given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said other bills of exchange, to secure the payment to the plaintiff of the money secured by the said other bills of exchange so given to the plaintiff as aforesaid, including the said sum of 100*l.* heretofore mentioned, and in the said other bills included as interest as aforesaid; and that save as aforesaid there never was any value or consideration for the acceptance by the defendant of the bills of exchange in the declaration mentioned, or any or either of them.

Demurrer, and joinder therein.

*Lush* (*Philbrick* with him), in support of the demurrer.—The 3 & 4 Wm. 4, c. 98, s. 7, exempted from the operation of the usury law, bills of exchange and promissory notes payable at or within three months after date. The 7 Wm. 4 & 1 Vict. c. 80 extended the exemption to bills and notes not having more than twelve months to run. That enactment was continued by the 2 & 3 Vict. c. 37, s. 1, which excepted from its operation loans on the security of land. The 17 & 18 Vict. c. 90, which passed in the year 1854, entirely repealed the usury law. This plea is bad for not alleging that the original bills were given while the usury law was in force; *Thibault v. Gibson* (a). But even assuming that they were, the bills declared on were given after the usury law was repealed, and therefore they are not affected by the previous illegal contract. [MARTIN, B. The 12 Anne, stat. 2, c. 16, rendered an usurious contract utterly void: then what consideration is there for the new bills?] By the 2nd section of the 17 & 18 Vict. c. 89, it is provided “that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this Act.” Therefore, as the original bills were void at the time they were given they could not now be enforced, but the receipt of money which the defendant was under a moral obligation to repay is a sufficient consideration to support a new contract after the usury law was repealed. *Barnes v. Hedley* (b) decided that after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. *Wicks v. Gogerley* (c) is an authority to the same effect. So in *Wright v. Wheeler* (d) where an obligee cancelled a bond by which usurious interest was payable, and the obligor gave him another bond for principal and legal interest only, Lawrence, J., ruled that it was valid. [MARTIN, B. It appears by the report in Camp. 157, that *Barnes v. Hedley* was first tried before Chambre, J., and he ruled that, if money is lent at usurious interest, a subsequent contract to repay the principal with legal interest was void under the 12 Anne, stat. 2, c. 16.] Though the contract is void, the original debt is a sufficient consideration to support a new promise. [POLLOCK, C. B., referred to *Fitzroy v. Gwillim* (e).] *Mather v. Lord Maidstone* (f) shows that a person may be liable on a new security although the one for which it was substituted could not be enforced against him.

*Macnamara*, in support of the plea. At the time the original bills were given an usurious contract was not only void but also illegal, for the person who received money under it was subject to a penalty

(a) 12 M. &amp; W. 88.

(b) 2 Taunt. 184.

(c) Ry. &amp; M. 123.

(d) 1 Camp. 165, note.

(e) 1 T. R. 153.

(f) 18 C. B. 273.

of treble the value. The 3 & 4 Wm. 4, c. 98, s. 7, and 7 Wm. 4 & 1 Vict. c. 80, do not affect this question, because they only created an exemption in certain cases from the penalties imposed by the 12 Anne, stat. 2, c. 16; and therefore it is sufficient for the defendant to show that the contract was usurious within that statute, and if the plaintiff relies on the exemption, that should come by way of replication: *Thibault v. Gibson* (a), *Washbourn v. Barrows* (b), *Derry v. Toll* (c). It appears that the bills declared on were drawn and accepted in the years 1855 and 1856, and therefore after the usury law was repealed by the 17 & 18 Vict. c. 90; but the plea shows that they were accepted to secure the payment of money lent upon an usurious contract, and secured by bills given while the usury law was in force. Therefore the substituted bills were tainted with the original usurious contract, and that being void, there was no consideration for them. The case falls within the 2nd section of the 17 & 18 Vict. c. 90, which preserves all rights and liabilities in respect of transactions previous to that Act. There is no new contract, but merely a renewed security for payment of money under an usurious contract. [WILDE, B.—If, before the usury law was repealed, the parties to an usurious contract destroyed the securities, and made a new contract to pay the principal and legal interest, that contract was valid, then why is not a new contract valid since the usury law has been altogether repealed?] *Barnes v. Hedley* (d) is distinguishable on two grounds: first, the destruction of the usurious securities by mutual consent was a sufficient consideration to support a new promise; and, secondly the promise was to pay the principal and legal interest. Here the bills declared on were given to secure payment of the usurious interest. Where a bill of exchange tainted with usury was in the hands of an innocent holder, and, on being informed of the usury, he took a fresh bill in lieu of it drawn by one of the parties to the usurious contract, and accepted, by a third person for his accommodation, it was held that the holder could not maintain an action against the acceptor of the substituted bill: *Chapman v. Black* (e). [POLLOCK, C. B.—If the innocent holder of a promissory note made for an usurious consideration took from the maker of it a bond for payment of the amount, the bond was valid: *Cuthbert v. Haley* (f). CHANNELL, B.—The 58 Geo. 3, c. 93, enacts that no bill of exchange or promissory note given upon an usurious contract shall be void in the hands of an indorsee for valuable consideration without notice.] *Cuthbert v. Haley* does not support the proposition contended for. There the Court expressed an opinion that a substituted security given for a security tainted with usury is void if given to a party to the original contract. *Wicks v. Gogerley* (g) is an authority in favor of the defendant, for it decided that a new promise to pay

(a) 12 M. & W. 88.  
(e) 2 B. & A'd. 588.

(b) 1 Exch. 167.  
(f) 8 T. R. 390.

(c) 5 Exch. 741.  
(g) R. & Moo. 123.

(d) 2 Taunt. 184.  
(g) R. & Moo. 123.

the principal originally lent on an usurious agreement is invalid, unless all payments beyond legal interest are repaid or deducted. Here the substituted security is for the principal and usurious interest. The receipt of the money under the usurious contract is no consideration for a new promise to pay it. There is a distinction between cases where there is a moral consideration for payment of a debt not enforceable at law, as where an infant after attaining his majority promises to pay a debt contracted during infancy, and where a statute has expressly declared that a particular contract shall be illegal and void. In the former case the duty constitutes a sufficient consideration for a promise to pay the debt, but in the latter, the contract being declared void and an offence at law, there can be no consideration for any new promise.

*Our. adv. vult.*

The learned Judges having differed in opinion, in the ensuing Term (May 8) the following judgments were delivered.

MARTIN, B. This is a demurrer to a plea. The action is upon several bills of exchange. The plea is that, before the making of the bills declared on, it was corruptly and against the form of the statutes agreed between the plaintiff and the defendant and one Robinson that the plaintiff should lend them 1,500*l.*, and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than lawful interest at the rate of 5*l.* per cent. per annum upon the sum so lent and forborne, and that for securing the repayment of the said sum of 1,500*l.* and interest, the defendant and Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they engaged to pay to the plaintiff, or his order, 1,600*l.* ten weeks after the date thereof and of the loan; that in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and Robinson accepted the bills, and that save as above there was no consideration for these acceptances; that these bills of exchange were dishonored at maturity, and that the bills of exchange declared on were given, after the passing of the Statute 17 & 18 Vict. c. 90, by way of renewal of the said first-mentioned bills, and accepted to secure the payment to the plaintiff of the money secured by the first-named bills so given to the plaintiff and the said usurious interest, and that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

The plea disclosed this state of things, viz., that, when the loan was made and the first bills of exchange given, the statute 12 Anne, Stat. 2, c. 16, was in operation, but that when the bills of exchange declared on were given the statute 17 & 18 Vict. c. 90, had passed. The latter statute repeals the statute of Anne; but the second section provides that nothing in it shall prejudice or affect the rights or remedies, or diminish or alter the liabilities of any person in respect of any act done

previous to its passing. The original loan and bills of exchange were therefore left unaffected by it. The statute of Anne enacts that no person upon any contract shall take for a loan of money above 5*l.* per cent. for a year, and that all contracts for payment of any principal so lent shall be utterly void, and that any person who shall take above 5*l.* per cent. for a year shall forfeit and lose for such offence treble the value of the money lent. The loan was therefore an illegal transaction, and the original contract to repay it and the bills of exchange given for it were utterly void; and the plea states that save these there was no other consideration for the bills declared on.

It is quite clear that a bill of exchange is a simple contract; it and promissory notes differ from other simple contracts in this, that *prima facie* they import consideration; but when it is proved that there was no consideration, or an illegal one, the bill of exchange or note is of no avail. It does seem superfluous to cite any authority for the above positions, but in my brother Byles' book upon Bills, page 111 (8th edition), it is stated that the defendant is at liberty in all cases (when the issue raised admits of it) to show affirmatively, by his own witnesses, absence or failure of consideration; and again, page 124, the consideration given for a bill must not be illegal; and at page 132, if part of the consideration of a bill be illegal, the instrument is vitiated altogether; and at page 288 usury is said to be an indictable misdemeanor at common law, for which Comyn's Digest, title Usury, is cited. Now the consideration for the bills declared on was the usurious loan, and the bills of exchange given to secure it. But the statute of Anne has declared these to be utterly void; and, speaking for myself, I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract. But the case does not rest here; for at page 294 the same learned author states that if an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the original usurious taint infects the subsequent security, and either is void. Now applying the above statement of the law, the consequence seems to me inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley* (a), was cited. According to the statement in the report, a person called Webb had agreed to lend money at 5*l.* per cent. interest, but with a proviso that he should also receive a commission of 5*l.* per cent. upon sugars to be bought of him or provided by him, and certain deeds and securities were given to him to secure the balance due. It was admitted at the trial that this

(a) 2 Taunt. 184.

was an usurious contract, but it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the original deeds and securities in the possession of Webb should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges, and the balance sought to be recovered in the action was composed of the principal moneys actually advanced, with lawful interest fairly and legally calculated, the whole commission and every objectionable charge being omitted. The account was delivered to the debtor, who acknowledged the balance, and promised to pay it, and thereupon the deeds and securities originally given to Webb were produced and cancelled and burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law, and so certified to the Lord Chancellor, the case being an issue from chancery. I cannot myself see the application of this case to the present. If it had appeared upon the record that the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills declared on for the amount of the original loan and legal interest, it would have been an authority in favor of the plaintiff; but nothing of the kind appears upon the plea: indeed the contrary appears, for the bills declared on are stated to have been given to secure the payment to the plaintiff of the money secured by the bills of exchange given to him in furtherance of the illegal and corrupt contract, and that there was no other consideration for them. The case has been put thus: That when the bills declared on were given, there was no usury law, and it was competent for the defendant to pay or contract to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real and true case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever shown on the record except bills given upon and in respect of a transaction which the law had declared to be utterly void, and which at one time seems to have been considered an indictable crime.

Another case was cited, *Wright v. Wheeler*, which will be found in a note to *Barnes v. Hedley (a)*. This was an action upon a bond. There had been an usurious contract, but afterwards the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal, with lawful interest. Mr. J. Lawrence was of opinion at

(a) 1 Camp. 165.

nisi prius that the bond was lawful. The parties, he said, had rectified their error, and substituted for an illegal contract one which was fair and legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract. *Cuthbert v. Haley* (a) is to the same effect.

A case of *Wicks v. Gogerley* (b) was also cited by the leading counsel for the plaintiff; but according to the statement of the law laid down there by C. J. Best, the plaintiff is not entitled to recover. He says the principle is, that where parties to an usurious agreement "state an account and agree upon the sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a fresh promise is made to pay that sum, such promise is free from the original usury and is perfectly valid in law. But in order to bring this case within the principle, all beyond legal interest must be repaid or deducted." In the report of *Barnes v. Hedley* in 1 Campbell, which I have before referred to, there is a judgment of Mr. J. Chambre, which seems to me to be well worthy of consideration by any one who desires to ascertain what is the true law upon this subject. There is also a case which was not mentioned in the argument, *Preston v. Jackes* (c), which was tried before Mr. J. Holroyd, who held that a party could not recover on a note which operated as a security for any usurious interest. This case seems to me in point for the defendant; and any opinion of Mr. J. Holroyd, wherever given, is entitled to the greatest weight and is of the highest authority.

The result is, that in my opinion an usurious loan within the statute of Anne, and usurious interest contracted to be paid for it, is not a good consideration for a bill of exchange, and that a bill given upon such consideration is not of avail; and this opinion does not contravene the case of *Barnes v. Hedley*, reported in 2 Taunton, or any other case or authority which I have met with or has been referred to; but on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C. B. The judgment which I am about to deliver is that of my brother Wilde and myself.

My brother Martin having stated the pleadings, it is not necessary to repeat them.

The real question raised by this demurrer is, whether there is a good consideration for the bills declared upon.

The original bills were given for an advance of money with usurious interest at a time when such a transaction was forbidden by law, and were therefore void and of no legal obligation.

(a) 8 T. R. 390.

(b) R. & Moo. 123.

(c) 2 Stark. 237.



The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to pay any amount of interest, however high, was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question.

The original bills therefore could not form a legal consideration for those now sued upon; indeed there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has voluntarily given these bills, and whether the law will permit and enforce such a contract is the question.

During the existence of the usury law the courts of law were bound to enforce them,—to deal with interest above the statute rate as an unlawful and forbidden thing,—and to discover and defeat all attempts, direct or indirect, to give or enforce it.

But the legislature has since repealed the laws against usury, and upon a fuller and wider view of public policy declared the rate of interest on loans to be unlimited and free.

The courts of law are bound with equal fidelity to give effect to this new and opposite view of the legislature. Interest above 5% per cent. should no longer be regarded as of necessity illegal or unrighteous, and no facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for, which used to be at a rate called usurious rate.

We make these remarks, because in argument the expression “taint of an usurious transaction” was often repeated, and the Court was pressed in language, commonly and properly used while the usury laws were in force, to give no countenance to a contract of which the origin was an advance of money with more than 5% per cent. interest.

Such remarks have no application to or bearing on a contract made like that in question since the usury laws have been repealed.

We therefore pass them by to consider the true question in the case, viz., whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so.

Such a consideration has been sometimes called a moral consideration. And we think unfortunately so; for the term used as a definition tends to include too wide a range of objects.

And there are many conjunctures in which a man may feel himself morally bound to pay money and promise to do so, which the law would not recognize as forming a good consideration.

But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid.

And though at the time of the advance the law, for reasons of public policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterwards if the legal prohibition be removed.

And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is, therefore, reasonable ground, as it seems to us, for this qualified proposition, viz.—That a man by express promise may render himself liable to pay back money which he has received as a loan though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.

There is likewise authority for it. The general doctrine within which such a proposition falls is, we believe, first found promulgated in Lord Mansfield's time. It is the subject of a long note to the report of the case of *Wennall v. Adney* (a). It has been the subject of much discussion in many subsequent cases. It was stated most widely, and perhaps too widely, in the case of *Lee v. Muggeridge* (b). And it has consequently been much qualified and sometimes disparaged since: see *Eastwood v. Kenyon* (c); *Beaumont v. Reeve* (d); *Cocking v. Ward* (e).

But it was repeated and stated to be undoubted law by Baron Parke, in *Earle v. Oliver* (f), who says: "The strict rule of the common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders* (g) and *Atkins v. Hill* (h). The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it.

There is a very able note to the case of *Wennall v. Adney* (i) ex-

(a) 3 Bos. & P. 249. (b) 5 Taunt. 45. (c) 11 A. & E. 447. (d) 8 Q. B. 487.

(e) 1 C. B. 870. (f) 2 Exch. 71, 89. (g) Cowp. 290. (h) Cowp. 284.

(i) 3 B. & P. 249. The note is as follows:—

"An idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord Mansfield and Mr. Justice Buller, which, if construed with the qualifications fairly belonging to them, do not warrant the conclusion which appears to have been rather hastily drawn from thence. In *Atkins v. Hill*, Cowp. 288, which was assumpsit against an executor on a promise by him to pay a legacy in consideration of assets,

plaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by

Lord Mansfield said: 'It is the case of a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise he could not be compelled to pay.' And in *Hawkes v. Saunders*, Cowp. 290, which was a similar case with *Atkins v. Hill*, Lord Mansfield said that the rule laid down at the bar 'that to make a consideration to support an assumpsit there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made,' was too narrow, and observed 'that a legal or equitable duty is a sufficient consideration for an actual promise; that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.' His Lordship then instanced the several cases of a promise to pay a debt barred by the Statute of Limitations, a promise by a bankrupt after his certificate to pay an antecedent debt, and a promise by a person of full age to pay a debt contracted during his infancy. The opinion of Mr. Justice Buller in the last case was to the same effect, and the same law was again laid down by Lord Mansfield in *Trueman v. Fenton*, Cowp. 544. Of the two former cases it may be observed that the particular point decided in them has been overruled by the subsequent case of *Deeks v. Strutt*, 5 T. R. 690. And it may further be observed, that however general the expressions used by Lord Mansfield may at first sight appear, yet the instances adduced by him as illustrative of the rule of law do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Lord Mansfield will an express promise have any operation, and there it only becomes necessary because, though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not, as in ordinary cases, imply an assumpsit against him. The same observation is applicable to *Trueman v. Fenton*, that being an action against a bankrupt on a promise made by him subsequent to his certificate respecting a debt due before the certificate. There is, however, rather a loose note of a case of *Scott v. Nelson*, Westminster Sittings, 4 Geo. 3, cor. Ld. Mansfield (see Esp. N. P. 945), in which his Lordship is said to have held a father bound by his promise to pay for the previous maintenance of a bastard child. And there is also an anonymous case, 2 Show. 184, where Lord C. J. Pemberton ruled that 'for meat and drink for a bastard child an *indebitatus assumpsit* will lie.' Although the latter case does not expressly say that there was a previous request by the defendant, yet that seems to have been the fact, for Lord Hale's opinion is cited to show 'that where there is common charity and a charge,' the action will lie; which seems to imply that if a charge be imposed upon one person by the charitable conduct of another, the latter shall pay; and though he adds, 'and undoubtedly a special promise would reach it,' that expression does not necessarily import a promise subsequent to the charge being sustained, but may be supposed to mean that, where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable even though he should not be so where the charge was only induced by his conduct without such engagement. The case of *Watson v. Turner*, Bull. N. P. 147, has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord Mansfield, because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed that 'this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor;' which obligation, being a legal obligation, distinguishes the case. Indeed in a late case of *Atkins v. Banwell*, 2 East, 505, that distinction does not seem to have been sufficiently adverted to; for *Watson v. Turner* was cited to show that a mere moral obligation is sufficient to raise an implied assumpsit, and though the court denied that proposition, yet Lord Ellenborough observed that the promise given in the case of *Watson v. Turner* made all the difference between the two cases, without alluding to another distinction which might have been taken; viz., that though the parish officers were bound by law in *Watson v. Turner*, the defendants in the principal case were not so bound, because the pauper had been relieved by the plaintiffs as overseers of another parish, though belonging to the parish of which the defendants were overseers. In the older cases no mention is made of moral obligation; but it seems to have been much doubted

the Statute of Limitations, and the rule in these instances has been so constantly followed, that there can be no doubt that it is to be considered as the established law."

whether mere natural affection was a sufficient consideration to support an assumpsit, though coupled with a subsequent express promise. Indeed Lord Mansfield appears to have used the term, 'moral obligation,' not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable from law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because, if it were not for the exemption, they would be enforced at law through the medium of an implied promise. In several of the cases it is laid down, that to support an assumpsit the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the Plaintiff. *Per* Coke and all the Justices, *Hatch and Capel's case*, Godb. 203; *per* Reeve, J. Mar. 203; *per* Coke, C. J., and Dodderidge, J., 3 Bulst. 162; and *per* Coke, C. J., 1 Roll. Rep. 61, pl. 4. And in *Lampleigh v. Brathwait*, Hob. 105, it was resolved 'that a mere voluntary curtesy will not have a consideration to uphold an assumpsit. But if that curtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit.' And in *Bret v. J. S. and his wife*, Cro. Eliz. 755, where the first husband of the wife sent his son to table with the plaintiff for three years at £8 per annum, and died within the year, and the wife during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the plaintiff £6 13s. 4d. for the time past, and £8 for every year after, and upon which promise the plaintiff brought his action; the court held that natural affection was not of itself a sufficient ground for an assumpsit; for although it was sufficient to raise an use, yet it was not sufficient to ground an action without an express *quid pro quo*; but that as the promise was not only in consideration of affection but that the son should afterwards continue at the plaintiff's table, it was sufficient to support a promise. In *Harford v. Gardiner*, 2 Leo. 30, it was said by the court, that love and friendship are not considerations to found actions upon, and in *Best v. Jolly*, 1 Sid. 38, where a father was held liable for his own and his son's debt, because he had promised to pay them if the plaintiff would forbear to sue for them, yet the court said, 'he was not liable for his son's debt,' but having induced forbearance, which is a damage to the plaintiff, he was held liable, 'though as to the son's debt it was no benefit to the defendant.' So in *Besfich v. Coggit*, Palm. 559, it was debated whether the defendant was liable upon an express promise to repay the plaintiff money laid out by him in Spain for the defendant's son, and the charges of his funeral, Hyde, C.J. and White-lock being of opinion that the action could not be maintained; Jones and Dodderidge *e contra* that it could. The former of which it should seem was the better opinion; for in *Butcher v. Andrews*, Carth. 446, on assumpsit for money lent by the plaintiff to the defendant's son at his instance and request, and verdict for the plaintiff, the judgment was arrested, Holt, C. J. saying, 'if it had been an *indebitatus* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not the son's; but when the money is lent to the son, it is his proper debt, and not the father's.' But in *Church v. Church*, B. R. 1656, cit. Sir T. Ray. 260, where defendant promised to repay the plaintiff the charges of his son's funeral, the latter was held entitled to recover, though no request was laid in the declaration. Of which case it may be observed, that possibly after verdict the court presumed a request proved; for in *Hayes v. Warren*, 2 Str. 933, though the court would not presume a request after judgment by default, yet they said they would have presumed it after verdict. However, in *Style v. Smith*, cited by Popham, J., 2 Leon. 111, it was determined that if a physician in the absence of a father give his son medicine, and the father in consideration thereof promise to pay him, an action will lie for the money. But the case of *Style v. Smith*, if closely examined, will not perhaps be found so discordant with the principle laid down in *Bret v. J. S. and his Wife* as may be supposed. From the expression 'in the absence of a father,' used in that case, it may be inferred that the son lived with the father, and that the medicine was administered to the son in the house of the father, while the latter was absent, from whence it results that the physician's debt, though not founded on any immediate benefit to the father, or on his request, was most probably founded on his credit; which credit, if fairly inferred

The case of *Fitzroy v. Gwillim* (a) is an example of the view that has been taken of the subject even in a court of law; but although that case is certainly not law, it is quite true that courts of equity have relieved (where their interference was wanting) only on the terms of the principal and legal interest being paid.

We think the view we have taken receives considerable support from the case of *Barnes v. Hedley* (b), which, if not a direct authority for the plaintiff, is somewhat similar in its circumstances; the usurious interest was in that case struck out, but now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defendant says, "I could not then make the promise. I can now and I am willing to do so."

The plaintiff is therefore, in our opinion, entitled to the judgment of the court.

*Judgment for the plaintiff.*

from circumstances by the physician, might operate to charge the father in the same way as his request would operate, the physician having sustained a loss in consequence of that credit. Indeed if any of the cases could be sustained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his son, because he has subsequently promised to pay it; by the same rule the son should be liable for the debt of the father upon a similar promise; for the same moral obligation exists in both cases. Yet in *Barber v. Fox*, 2 Saund. 136, the court arrested the judgment in an action of assumpsit on a promise made by the defendant, to avoid being sued on a bond of his father, it not being alleged that the defendant's father had bound himself and his heirs; for they refused to intend even after verdict that the bond was in the usual form, and consequently held the promise of the defendant *nudum pactum*, he not appearing to have been liable to be sued upon the bond. And this last case was confirmed in *Hunt v. Swain*, 1 Lev. 165; Sir T. Ray. 127; 1 Sid. 248; see note 2 to *Barber v. Fox*, by Mr. Serjt. Williams. Indeed it is clear from *Loyd v. Lee*, 1 Str. 94, and *Cockshott v. Bennett*, 2 T. R. 763, that if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract. Yet according to the commonly received notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. In addition to the cases already collected upon this subject, it may be observed, that in *Mitchinson v. Hewson*, 7 T. R. 348, the court of King's Bench, upon the authority of *Drue v. Thorne*, All. 72, held a husband not liable to be sued alone for the debt of his wife contracted before marriage, though the objection was only taken in arrest of judgment, and consequently a promise by him to pay the debt appeared upon the record. From whence this principle may be extracted: that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an assumpsit to pay in another right."—ED.

(a) 1 T. R. 153.

(b) 2 Taunt. 184.

## CHAPTER VI.

### PARTIES TO CONTRACTS.

#### SECTION I.—OF PARTIES IN GENERAL.\*

Number of Parties ..... 500 Joint Contracts ..... 501 Joint Debtors ..... 502 Joint Creditors ..... 504 Several Contracts ..... 505 Joint and Several Contracts ..... 505	Construction of Contracts as to Joint and Several Parties .... 506 Rights of Joint Parties <i>inter se</i> .. 508 Contract affects Parties only .... 508 Contracts in Writing <i>inter partes</i> 510
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**Number of parties.**—Every contract necessarily involves two parties, one bound to perform the contract, and the other entitled to have it performed.

For example, in order to constitute a promissory note there must be both a promiser and a promisee. A note in which the maker promises to pay to himself, or to his own order, is not a promissory note, and contains no binding engagement. An instrument so drawn is incomplete, being in the nature of a conditional engagement, in case the maker should afterwards indorse the note, to pay it to the person to whom by such indorsement he should direct it to be paid; if indorsed specially, it imports a promise to pay to the person to whom it is indorsed or his order; if the maker indorses it in blank and circulates it, it becomes in effect payable to the bearer (*a*).

So, a promissory note made payable nine months after date, “to the secretary for the time being” of a society, was held invalid, because it did not show a certain payee (*b*); and for the same reason a bill of exchange drawn payable six months after date, to the order of “the treasurer for the time being” of an institution, was held invalid (*c*); but a promissory note made payable “to the trustees of the N. chapel or their treasurer for the time being” was held valid; the trustees being taken to be the payees, and the treasurer only their agent to receive payment (*d*). An instrument in the form of a bill of exchange and accepted, but without the name of either a

(*a*) *Brown v. De Winton*, 6 C. B. 336.  
 (*b*) *Cowie v. Stirling*, 6 E. & B. 333;  
 25 L. J. Q. B. 335.

(*c*) *Fates v. Nash*, 8 C. B. N. S. 581;  
 29 L. J. C. P. 306.

(*d*) *Holmes v. Jaques*, L. Rep. 1 Q. B. 376; 35 L. J. Q. B. 130.

drawer or payee, does not constitute a binding contract, though capable of being completed by adding the names of such parties (*a*).

An insurance office having two departments, one for insurance and the other for annuities, the latter department effected a policy of insurance with the former, upon the life of a person to whom a loan had been made, and who had covenanted to pay the premiums for insuring his life; it was held that the policy so made was a nullity, because made by the company with themselves, and that the debtor could not be charged with the premiums (*b*). So, a covenant made by a person with himself and others jointly, to pay money on their joint account, was held void (*c*).

Where a shipowner carries his own goods in his own ship, there is no "freight" properly so called, because there can be no contract made by the shipowner with himself in respect of the carriage. Hence, in such a case, the underwriters on the ship, upon abandonment of the ship as lost, having brought the goods to their destination, it was held that they had no claim upon the owner for freight in respect of the carriage of the goods to the place where the ship was lost, notwithstanding the general rule that the abandonees of a ship are entitled to all the freight earned by it at the time of abandonment (*d*). So, the mortgagee of a ship with the freight, on taking possession of the ship, cannot claim freight in respect of a cargo shipped by the owner, because the owner cannot contract with himself (*e*).

**Joint contracts.**—Several persons may join in a contract on the one part or on the other; that is to say, in respect of the same debt or liability more persons than one may be joined in the character of *creditor* or promisee, or more persons than one in the character of *debtor* or promiser, or more persons than one in both characters. In such cases the persons jointly becoming party to the contract, though they may have several interests relatively to one another, are considered as united in interest relatively to the other party to the contract. Contracts of this kind are called *joint contracts* or *joint debts*; and the persons composing the respective parties thereto are called *joint creditors* or *joint promisees*, and *joint debtors* or *joint promisers*.

In some cases, where several persons are associated jointly to fill an office, or authorized jointly to conduct some business, they are all required to join in contracting, and less than all cannot validly contract. Thus, where two persons were appointed to fill the office of clerk to trustees of a turnpike road, it was held that they must both

(*a*) *McCall v. Taylor*, 19 C. B. N. S. 301; 34 L. J. C. P. 365; and see *Stoesiger v. South-Eastern Ry. Co.*, 3 E. & B. 549; 23 L. J. Q. B. 293.

(*b*) *Grey v. Ellison*, 25 L. J. C. 666.

(*c*) *Faulkner v. Lowe*, 2 Ex. 595.

(*d*) *Miller v. Woodfall*, 8 E. & B. 493; 27 L. J. Q. B. 120.

(*e*) See *Gumm v. Tyrie*, 4 B. & S. 680; 33 L. J. Q. B. 97; 34 *ib.* 124.

join in executing a contract on the part of the trustees; Tindal, C. J. said:—"How are we to say that if the trustees have appointed two clerks, perhaps for the benefit of having their united judgment, the two are not to be parties to a contract which is to bind the trustees? it is like the case where two execute the office of sheriff or bailiff"

(a). The provisional committee of a railway company appointed eight persons as a managing committee, with authority to carry out the scheme, but without provision that any number less than the whole might act, and six of them gave an order to the plaintiff for certain work; it was held that the defendant, a member of the provisional committee, was not bound by the order so given (b).

The peculiar effects of joint contracts may be considered:—1. Where the contract is joint on the part of the promiser or debtor. 2. Where the contract is joint on the part of the promisee or creditor.

**Joint debtors.**—1. As to joint promisers or debtors:—If an action is to be brought upon a contract made by several persons jointly, who are still living and are resident within the jurisdiction of the Court, they should all be joined as defendants in the action. If one of them is sued alone, he is not bound to answer to the merits of the action without the rest being sued with him; he may plead in abatement of the writ, that is, that the debt was due, or the promise was made by him, jointly with another or others, who is or are still living and resident within the jurisdiction of the Court, and not by himself alone. But that is the only mode in which he can object to being charged separately; and if he pleads to the merits of the claim, as by plea of *non est factum* or *non assumpsit* or the like, he cannot raise any valid objection on the ground of others being jointly liable with him (c).

The liability of one of joint promisers or debtors was explained by Abbott, J., as follows (d):—"By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint. In *Whelpdale's Case* (e), the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded *non est factum*; the jury found that the bond was a joint bond, made by the defendant and another to the plaintiff, and upon this special verdict it was adjudged by the Court, that the plaintiff should recover: "because when two men are *jointly* bound, in one bond, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed: for he has sealed and delivered it, and each of them is bound in the whole." That was a case upon a deed, but *Price v. Shute* (f) was a case upon a simple contract; and it

(a) *Bell v. Nixon*, 9 Bing. 398.

(b) *Brown v. Andrew*, 18 L. J. Q. B. 153; and see *Guthrie v. Armstrong*, 5 B. & Ald. 628.

(c) *Sheppard's Touchstone*, p. 376.

(d) *Richards v. Heather*, 1 B. & Ald. 29, 35.

(e) 5 Rep. 119.

(f) 5 Burr. 2613.



was there held, that although the promise was a joint promise, yet the defendant, who was sued alone, could not say that he did not promise ; and that the only way of taking advantage of the omission of the other joint contractor, was by plea in abatement. These two cases establish this, that proof of a joint contract is sufficient to sustain an allegation that one contracted ; and, therefore, there is no variance." Hence, each party to a joint contract is severally liable, in the sense that, if sued severally and he does not plead in abatement, he becomes liable to the creditor for the entire debt (a).

So, where more than one of several joint contractors are sued jointly, omitting others, the defendants may plead the non-joinder in abatement ; but, if they do not, the proof of the joint contract is sufficient to charge them. Thus, in an action on a bill of exchange, the declaration charged it to have been drawn upon and accepted by the three defendants, and it was proved to have been drawn upon and accepted by the three, jointly with a fourth ; it was held that there was no variance, and that the contract charged was proved (b).

The plea in abatement of the non-joinder of a joint contractor cannot be sustained, where the alleged joint contractor is dead, or where he is not resident within the jurisdiction, or where he has been discharged from the debt by proceedings in bankruptcy or insolvency, or where he was an infant at the time of contracting and has since avoided the contract, or where the debt is barred as against him by the Statute of Limitations (c). In all which cases the person sued may be charged by the creditor with the entire debt.

Where the joint contractors are sued jointly, and the judgment passes against them jointly, though the writ of execution must follow the judgment and charge all the defendants jointly, yet, in putting the writ in force, the whole amount of the judgment may be levied against one separately ; consequently, each joint contractor becomes ultimately liable to the creditor for the whole, and not only for his proportionate part, although the contract be joint (d).

The County Court Act, 9 & 10 Vict. c. 95, s. 68, enables a plaintiff to sue any one or more joint debtors without the others, and to obtain judgment and execution against those sued.

Upon the death of one of several joint contractors, the liability under the contract devolves on the surviving joint contractors or joint contractor ; the representative of the deceased cannot be sued at law jointly with the survivors. Consequently, the whole liability ultimately

(a) *Abbot v. Smith*, 2 W. Bl. 947; see *King v. Hoare*, 13 M. & W. 494, 505; *Cross v. Williams*, 7 H. & N. 675; 31 L. J. Ex. 145.

(b) *Mountstephen v. Brooke*, 1 B. & Ald. 224.

(c) See Bullen & Leake, Prec. Pl. 2nd ed. 411, 412.

(d) Per Lord Mansfield, C. J., *Bird v. Randall*, 1 W. Bl. 387, 388; and see *Abbot v. Smith*, 2 W. Bl. 947, 949; per Lord Kenyon, C. J., *Herries v. Jamieson*, 5 T. R. 553, 556.

devolves upon the last surviving contractor, and after his death upon his representatives (*a*). A release made to the executor of one of joint obligors is inoperative, because upon the death of the one the debt survived against the others (*b*).

Upon the death of one of several joint contractors after judgment obtained against them, the liability upon the judgment devolves upon the survivors, and execution by *fi. fa.* or *ca. sa.* may be levied against them without reviving the judgment; but the judgment, as a charge upon the real estates of the joint contractors, remains unaltered by the death, and the creditor may have execution by *elegit* against the lands of the deceased, equally with the survivors, by reviving the judgment against the survivors and the terretenants of the deceased (*c*).

**Joint creditors.**—2. As to joint promisees or creditors:—Where the contract is joint on the part of the promisees or creditors, all the persons entitled under it must join in suing upon it as joint plaintiffs (*d*). A disclaimer by one of the joint promisees, by a deed to which the promiser is not also a party, will not entitle the others of the joint promisees to sue alone upon the contract (*e*).

If one of the joint promisees is omitted, and the defect appears upon the record, it may be objected to by demurrer, or by motion in arrest of judgment, or by error (*f*). If the objection does not appear upon the record, and the action proceeds to trial, there would be a variance between the contract appearing in fact and that alleged upon the record, which, unless amended, would be ground for a nonsuit or adverse verdict, and prove fatal to the plaintiff's case (*g*). The objection may be taken by the defendant at an earlier stage, by pleading in abatement, that the promise was made to the plaintiff and another jointly and not to the plaintiff alone, or by giving a notice in writing to the plaintiff to the same effect under the provision of the Common Law Procedure Act 1852, C. L. P. Act, 1852, s. 35. The omission may be amended by the plaintiff before trial under the provisions of s. 34 of the C. L. P. Act, 1852, or, unless the defendant has previously taken the objection, at the trial under s. 35 (*h*).

Where one of several joint creditors or promisees dies, the legal right under the contract devolves upon the survivors, who only must

(*a*) See Shepp. Touch. by Preston, p. 376; *Richards v. Heather*, 1 B. & Ald. 29; *Calder v. Rutherford*, 3 B. & B. 302. As to the liability in equity of the executor of a deceased joint contractor, see Wms. Ex. 5th ed. p. 1577.

(*b*) *Ashbee v. Pidduck*, 1 M. & W. 564.

(*c*) *Harbert's Case*, 3 Co. 14 a; 2 Wms. Saund. 60 a (4); 72 l.

(*d*) *Eccleston v. Clipsham*, 1 Wms.

Saund. 153; *Hatsall v. Griffith*, 2 C. & M. 679; *Pugh v. Stringfield*, 3 C. B. N. S. 2; 4 ib. 364; 27 L. J. C. P. 34, 225.

(*e*) *Wetherell v. Langston*, 1 Ex. 634.

(*f*) *Petrie v. Bury*, 3 B. & C. 353; *Pugh v. Stringfield*, *supra*; *Wetherell v. Langston*, 1 Ex. 634.

(*g*) *Chanter v. Leese*, 4 M. & W. 295.

(*h*) See Bullen & Leake, Prec. Pl. 2nd ed. 405.

sue upon the contract. The representative of the deceased joint creditor or promisee cannot be joined in suing with the survivors, nor can he sue alone (a).

**Several contracts.**—Several persons may contract separately respecting the same matter. Thus, several persons may bind themselves severally to another in respect of the same matter or debt, so that the creditor is entitled to claim the whole debt or performance against each debtor separately; or one person may bind himself to each of several persons in respect of the same matter or debt, so that each of such creditors is separately entitled to claim the whole debt or performance. The peculiar characteristic of such contracts is the identity of the debt or matter in the several contracts; so that the payment or performance of one of the contracts discharges all (b).

A frequent use of this mode of contracting occurs in guarantees, where a principal debtor and sureties become severally bound to the creditor for the debt or matter guaranteed; the creditor may sue one or other of the debtor and sureties separately for the whole amount, and payment by one discharges all as against the creditor; though, as between themselves, the sureties who are compelled to pay may be entitled to recover the amount from the principal debtor, or proportionate part of it from the other sureties.

**Joint and several contracts.**—Several persons may enter into concurrent contracts respecting the same matter, binding themselves *jointly* as one party, and also *severally* as separate parties, at the same time; in which case, besides the one joint contract, there are also as many several contracts as there are separate persons; the debt or matter of the contract being one and the same in all the contracts thus made. Thus, a joint and several promissory note by several makers is equivalent to a joint note, and as many distinct separate notes as there are makers (c). "If A. and B. covenant jointly and severally, the covenant may be joint or several, and the covenantors may be sued either all together, or all of them apart, at the election of the covenantee" (d). "If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all, or each of them separately" (e); but if two of the

(a) *Martin v. Crump*, 2 Salk. 444; 1 L. Raym. 340; *Anderson v. Martindale*, 1 East, 497; and see *Jell v. Douglas*, 4 B. & Ald. 374; *Scott v. Godwin*, 1 B. & P. 67, 74.

(b) This is called in the civil law *obligatio in solidum*, Mackeldey, § 330; Warnkoenig, § 539; and see Code Civil,

l. 3, t. 3, s. 4. "Des obligatious solidaires."

(c) *Beecham v. Smith*, E. B. & E. 442; 27 L. J. Q. B. 257.

(d) Shepp. Touch. by Preston, pp. 166, 180, 376.

(e) Per Buller, J. *Streatfield v. Halliday*, 3 T. R. 779, 782.

three obligors are sued alone, they can object only by pleading in abatement of the action, that there is another joint obligor (*a*).

But it seems that a contract cannot be so made, in respect of one and the same matter, as to entitle several persons under it both jointly and severally; they must either be entitled under it jointly only, or severally only (*b*).

**Construction of contracts as to joint and several parties.**—Where several persons join in a contract in respect of the same matter, the question whether they do so *jointly* as one party, or *severally* as distinct parties entering into several contracts, or, in the case of the persons bound, *jointly and severally*, making a joint contract and several distinct contracts at the same time, depends on the intentions of the parties, as manifested in the evidence of the contract. Some rules for the construction of contracts in this respect have been laid down by the authorities.

**As to joint or several liability.**—1. With respect to the liability of several persons under the contract, it is laid down in Sheppard's Touchstone as follows:—"If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only and not several; but if it be thus, *obligamus nos et utrumque nostrum*, or *obligamus nos et unumquemque nostrum*, or *obligamus nos et quemlibet nostrum*, etc., in all these cases the obligation is both *joint* and *several*.—But the more proper form is, "We bind ourselves, our heirs, executors, and administrators, and each of us bindeth himself, his heirs, executors, and administrators" (*c*). 'Hence in written contracts the language used is the primary guide to the meaning; but it is not always conclusive. The language is sometimes ambiguous, and often not exclusive of an intention of contracting in either way; in which case the sense must be derived from the interests and relations of the parties as appearing in the contract (*d*). The words of a deed executed by several parties were, "We bind ourselves and each of us for himself for the whole and entire sum of £1000 each;" the instrument was held from the context to constitute a several bond by each of the parties for a several sum of £1000, and not a joint bond (*e*).

**As to joint or several rights.**—2. With respect to the right of several persons under such contracts a rule of construction has been

(*a*) See *ante*, p. 503; 1 Wms. Saund. 154 *a*, 291 *g*.

(*b*) *Slingsby's case*, 5 Co. 18 *b*; *Bradburne v. Botfield*, 14 M. & W. 559, 573; *Keightley v. Watson*, 3 Ex. 716, 723.

(*c*) Shepp. Touch. by Preston, p. 375.

(*d*) See *Lee v. Nixon*, 1 A. & E. 201, 208.

(*e*) *Collins v. Prosser*, 1 B. & C. 682; and see other examples, *Mathewson's Case*, 5 Co. 23; *Duke of Northumberland v. Errington*, 5 T. R. 522; *Mansell v. Burridge*, 7 T. R. 352; *Lord Galway v. Matthew*, 1 Camp. 403; *Ex p. Buckley*, 14 M. & W. 469.

adopted to the following effect:—A contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it; if the words are ambiguous or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several (*a*). But a contract entered into with several persons, in respect of the same matter or interest, cannot by any words be made so as to entitle them both jointly and severally (*b*).

An estate was conveyed to several persons jointly, and the grantor covenanted with those persons, *et cum quolibet eorum*, that he had a good title; it was held that, the interest of the covenantees being joint, the covenant was joint and not several, and that the words *cum quolibet eorum* were void of effect; and it was laid down that if a grantor by deed conveys several estates to several persons severally, and covenants with them, *et cum quolibet eorum*, that he had title, the covenant is several by reason of the several interests of the covenantees (*c*). One of the parties to a deed “covenanted and agreed to and with the other and others of them respectively, and his and their respective executors and administrators, etc.,” and the interest of the covenantees in the matter of the covenant was joint; the covenant was construed to be made with them jointly and not severally, so that one of them could not sue alone (*d*). The defendant covenanted with A., his executors, administrators, and assigns, and also with B. and his assigns, to pay an annuity to A. during B.’s life; it was held that the legal interest was joint, though the benefit was for A. only, and, therefore, the covenant was joint and not several, so that after A.’s death the right of action survived to B. solely, and the administrator of A. could not sue upon the covenant (*e*).

By a deed made between the plaintiff and H. of the one part and the defendant of the other part, after reciting an agreement for a loan on mortgage of a sum of money then in plaintiff’s hands as trustee for H., the defendant covenanted “with the plaintiff, his executors, etc., and also, as a distinct covenant, with H. his executors, etc.,” to pay interest on the loan until repayment of the principal; it was held that the covenantees had a joint interest, and, therefore, the covenant was joint only and not several (*f*). In a deed in which the defendant covenanted with one of the parties, and “as a separate covenant” with another of the parties, and the interests of those parties were several,

(*a*) Shepp. Touch. by Preston, p. 166; *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Sorsbie v. Park*, 12 M. & W. 146; *Keightley v. Watson*, 3 Ex. 716, 722; *Foley v. Addenbrooke*, 4 Q. B. 197; *Pugh v. Stringfield*, 3 C. B. N. S. 2; 4 *ib.* 364; 27 L. J. C. P. 34, 225; *Haddon v. Ayers*, 1 E. & E. 118; 28 L. J. Q. B. 105.

(*b*) See *ante*, p. 506 (*b*).

(*c*) *Slingsby’s case*, 5 Co. 18.

(*d*) *Eccleston v. Clipsham*, 1 Wms. Saund. 153.

(*e*) *Anderson v. Martindale*, 1 East, 497.

(*f*) *Hopkinson v. Lee*, 6 Q. B. 964.

the covenants were construed to be several (*a*). The defendant by a deed covenanted "with each of the said parties thereto of the third part;" it was held that the covenant was in point of form several, and, the interest of the covenantees being also sufficiently several to support a several covenant, it was so construed (*b*).

If tenants in common demise jointly and the lessee covenants to repair, the interest of the lessors in the covenant is joint, and they must join in suing upon it (*c*).

**Rights of joint parties as between themselves.**—The rights and liabilities of persons who have contracted jointly or severally respecting the same matter, as between themselves, depend upon the relation in which they stand, and the agreement or understanding upon which they have joined in the contract; the contract itself, in general, is independent of such relation or agreement. Thus, in contracts of guarantee made between a creditor and the principal debtor and his sureties, which have been referred to above as a common application of this mode of contracting, the principal debtor and the sureties are, usually, all made debtors in equal degree to the creditor, who may recover the whole debt against all or any of them. As between themselves, however, the principal debtor is solely liable; and if the surety is called upon by the creditor to pay any part of the debt, he may, upon payment, recover the amount from the principal debtor. So, where there are several sureties who are all primarily liable for the whole debt to the creditor, and one of them is called upon to pay, each of the other co-sureties becomes ratably indebted to him for contribution.

The principal contract may, however, in some cases be affected by the rights and relations of the several parties who join in it; as in the case of the relation of principal and surety existing between them, the creditor is bound, upon principles of equity, to abstain from any dealing with the debtor which may affect the liability of the surety, or prejudice his position. Thus, if the creditor binds himself to give time to the principal debtor, without the consent of the surety, the latter is thereby discharged (*d*).

**A contract affects parties only.**—The legal effect of a contract is, as a general rule, confined to the parties to it. A contract cannot create a right or a liability in a person who is not a party.

In the case of *Crowe v. Rogers* (*e*), the declaration charged a con-

(*a*) *Keightley v. Watson*, 3 Ex. 716.

(*b*) *Mills v. Ladbroke*, 7 M. & G. 218.

(*c*) *Kitchen v. Buckley*, 1 Lev. 109; T. Raym. 80; *Foley v. Addenbrooke*, 4 Q. B. 197; *Thompson v. Hakewill*, 19 C. B. N. S. 713; 35 L. J. C. P. 18; and see *Bradburne v. Botfield*, 14 M. & W. 559

(*d*) *Rees v. Berrington*, 2 Ves. jun. 540; 2 White & Tudor, L. C. 2nd ed. 814; *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J. Q. B. 156; see *Whitcher v. Hall*, 5 B. & C. 269.

(*e*) *Strange*, 592.

tract between the plaintiff and the defendant, that one H., being indebted to the plaintiff in a certain sum, it was agreed between H. and the defendant that the defendant should pay the debt to the plaintiff in consideration of H. conveying to the defendant a house, and the plaintiff claimed payment of the debt from the defendant; upon demurrer the Court held the declaration bad, because it stated the agreement to be between H. and the defendant, and the plaintiff was a stranger to the contract. In *Price v. Easton* (a), the contract was stated in the declaration to be, that W., being indebted to the plaintiff, agreed with the defendant to work for him at certain wages and leave the amount in his hands, in consideration of which the defendant promised to pay the debt to the plaintiff; after verdict for the plaintiff, judgment was arrested on the ground that the plaintiff was a stranger to the contract; Littledale, J., said, "No privity is shown between the plaintiff and defendant. This case is precisely like *Crowe v. Rogers* and must be governed by it."

Certain commissioners let tolls to the defendant at an annual rent, which the defendant agreed in writing to pay to the treasurer of the commissioners; it was held that as the contract was made with the commissioners, and not with the treasurer, an action could not be brought by the treasurer in his own name to recover the tolls (b). The partners in a cost-book mine agreed that the amount of calls due from any one of them should be considered as a debt due to the purser, who should have power to sue for it; but it was held that such agreement gave the purser no right of action, as he was merely a servant of the company, and no party to the agreement (c). Where a contract is made with several persons jointly, to pay money to one of them only, the right against the debtor accrues to the joint parties to the contract, and not severally to the person to whom the money is to be paid; and all the persons to whom the promise was made must join in suing upon it, although one only was to receive the money (d).

An exception to this rule occurs with simple contracts, (other than bills of exchange and promissory notes,) in which the actual party to the contract is an agent for an undisclosed principal; under such contracts the principal, subject to certain conditions, may be entitled to claim the benefit of the contract or may be charged with the liability (e).

There are some old decisions to the effect that a stranger to the contract may maintain an action upon it, if he stand in such a relationship to the contracting party, that it may be considered that the contract was made for his benefit; as in the case of a contract made with

(a) 4 B. & Ad. 433.

(b) *Pigott v. Thompson*, 3 B. & P. 147.

(c) *Hybart v. Parker*, 4 C. B. N. S. 209; 27 L. J. C. P. 120.

(d) *Chanter v. Leese*, 4 M. & W. 295; and see *Jones v. Robinson*, 1 Ex. 454; *Anderson v. Martindale*, 1 East, 497.

(e) *Beckham v. Drake*, 9 M. & W. 79; 2 H. L. C. 579.

a father to pay money to his son or daughter, it was formerly held that the son or daughter might sue upon the contract (a); but no modern case can be found to support such an exception to the general rule. In the recent case of *Tweddle v. Atkinson* (b), it appeared that, after a marriage, the fathers of the husband and wife agreed together to pay each a sum of money to the husband, and they also agreed that the husband should have full power to sue for the money; it was held, nevertheless, that the husband, being no party to the agreement, could not sue upon it.

**Contracts in writing inter partes.** The question who are the parties to a contract, where the contract is made in writing, is, in general, determined by the written terms. Where an indenture is made *inter partes*, the express mention of the parties to the contract negatives the existence of any other parties. Those persons only can acquire a right or incur a liability, or can sue or be sued under the indenture, who are named or described in it as parties (c). An indenture of lease was expressed to be made between "A. for and on behalf of B. on the one part and C. on the other part," and A. executed the deed in his own name; it was held that B. could not maintain an action upon the covenants in the deed, although the covenants were expressed to be made by C. to and with B. (d). A and B. by indenture demised to D., who by the same deed covenanted with A. B. and E. (E. not being named amongst the parties to the deed), to pay rent to E., to repair, etc.; it was held that E., being a stranger to the deed, could not join with A. and B. in an action for non-performance of the covenants (e).

A composition deed specified the parties of the first part as "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents;" it was held that creditors who did not execute the deed were not parties to the deed within the above description, and could not take advantage of the covenants, although expressed to be made with the parties of the first part and all other creditors, and so were not on an equality with the executing creditors; and that therefore the deed was not valid against non-executing creditors, under the Bankruptcy Act, 1861, s. 192 (f); but upon a similar deed expressly made with "all the creditors" and in which the debtor covenanted with each cred-

(a) *Bourne v. Mason*, Vent. 6; *Dutton v. Poole*, 2 Lev. 211; and see per Lord Mansfield, *Martyn v. Hind*, Cowp. 437, 443.

(b) 1 B. & S. 393; 30 L. J. Q. B. 265.

(c) 2 Inst. 673; see the note to *Pigott v. Thompson*, 3 B. & P. 147, 149 (a); *Beckham v. Drake*, 9 M. & W. 79, 95; *Chesterfield Silkstone Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121.

(d) *Berkeley v. Hardy*, 5 B. & C. 355; and see *Appleton v. Binks*, 5 East, 148.

(e) *Lord Southampton v. Brown*, 6 B. & C. 718.

(f) *Chesterfield and Midland Silkstone Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121; *Gurrin v. Kopera*, 3 H. & C. 694; 34 L. J. Ex. 123; and see *Ex p. Cockburn*, 33 L. J. B. 17.



itor severally, it was held that all the creditors were parties to the deed, and could sue upon the covenants (a).

If a deed is made in the name of a corporation and sealed with the common seal, members of the corporation cannot sue upon it in their individual characters, though they are mentioned by name in the deed as parties in their official capacity, because they are not parties to it individually (b).

But parties to a deed may be designated by the name or description which they use for their trade or business, without mentioning their own proper names. Thus, where a deed was made with "The City Investment and Advance Company," and it appeared that two individuals carried on a business in that name and were intended in the deed by that description, it was held that they were parties to the deed in their individual characters (c). So, where a bond was made in favor of "Widow Moller and Son," the plaintiffs, who were proved to be the persons meant by that name, were held entitled to sue upon it (d). In a composition deed made between the debtor of the one part and "all the creditors" of the other part, the creditors were held to be sufficiently designated as parties, and entitled to sue upon the covenants made by the debtor with the creditors (e).

Where a covenant is made in the form of a deed poll, which does not contain any formal statement of the parties to whom it is made, the covenantee appears as a party to the covenant merely from the designation of him by the covenantor; and it is not necessary that the covenantee should be named, but he may be designated by a sufficient description. A policy of insurance was made in the form of a deed poll, in which the insurers covenanted to pay the loss and damage insured against, without specifying the covenantee by name; it was held that the parties interested in the insurance were sufficiently designated to entitle them to sue upon the covenant (f).

A simple contract in writing, expressed to be made *inter partes*, also impliedly excludes all parties not named or described in it as such; for to admit evidence to make a person a party to such an agreement who was not so named or described in it, would amount to altering the effect of a written instrument by extrinsic evidence (g). But with simple contracts, except bills of exchange and promissory notes, if the persons named or described as the actual parties are agents for others whose names do not appear, extrinsic evidence may

(a) *Gresty v. Gibson*, 4 H. & C. 28 L. Rep. 1 Ex. 112; 35 L. J. Ex. 74; *Reeves v. Watts*, L. R. 1 Q. B. 412; 35 L. J. Q. B. 171.

(b) *Cooch v. Goodman*, 2 Q. B. 850.

(c) *Maugham v. Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19.

(d) *Moller v. Lambert*, 2 Camp. 548.

(e) *Gresty v. Gibson*, 4 H. & C. 28; L. Rep. 1 Ex. 112; 35 L. J. Ex. 74; *Reeves v. Watts*, L. Rep. 1 Q. B. 412; and see *supra*.

(f) *Sunderland Marine Insurance Co. v. Kearneg*, 16 Q. B. 925; 20 L. J. Q. B. 417.

(g) *Robinson v. Judkins*, L. J. Ex. 56.

be admissible in order to entitle the principal to the benefit of the contract or to charge him with the liability (a).

An exception to the rule that no person can sue upon a deed or agreement *inter partes*, except the parties to it, has been made by some statutes relating to public companies and other public bodies; for instance, by the Joint Stock Banking Companies Act, 7 Geo. IV. c. 46, s. 9, all proceedings at law or in equity, for or on behalf of such copartnerships, are to be prosecuted in the name of one of the public officers of the copartnership; and under this Act it is held that upon a covenant made to covenantees by name, as trustees of the company, the company is bound to sue by its public officer, and cannot sue otherwise (b). Another exception has been made to this rule by the Act to amend the law of real property (8 & 9 Vict. c. 106) which enacts by s. 5, "that under an indenture, executed after the 1st October, 1845, the benefit of a covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture."

SECTION II.—CAPACITY OF PARTIES.

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A person is presumed by law capable of being party to a contract until the contrary appears; but persons in some states or conditions, as infants, married women, and persons in a state of insanity; and persons of certain kinds as corporations, are affected by law with various degrees of incapacity in that respect, the nature and effect of which have now to be considered.

*Contracts with infants.*

**Liability of infant on contracts.**—An infant, or person under the age of twenty-one years, cannot validly bind himself to another by contract, except for *necessaries* suitable to his age, condition, and wants. A contract made by an infant, except for necessaries, may be avoided by him on the ground of his infancy; and in an action brought against him upon the contract, he may defend himself by pleading specially that at the time of making it he was an infant (c).

**Liability of infant for wrongs.**—The defence of infancy cannot be pleaded in actions for wrongs independent of contract; but it may be pleaded in all cases where the cause of action is substantially founded on a contract, though the declaration might be framed in the

(a) <i>Beckham v. Drake</i> , 9 M. & W. 79; 2 H. L. C. 579.	utes, <i>Smith v. Goldsworthy</i> , 4 Q. B. 430; <i>Cobham v. Holcombe</i> , 8 C. B. N. S. 815.
(b) <i>Chapman v. Milvain</i> , 5 Ex. 61; and see like exceptions under other stat-	(c) See Reg. Gen. 8, T. T. 1853.

form of tort instead of in contract; so that the plaintiff cannot indirectly make the defendant liable on a contract made during infancy by merely changing the form of his declaration (a). But where the defendant has wrongfully obtained money of the plaintiff under such circumstances that the plaintiff is entitled to waive the wrong and claim restitution of the money under an implied contract in an action for money received for his use, it has been held that the defendant cannot plead infancy in such action (b).

**Liability of infant on contract induced by fraud.**—Where an infant has induced another party to contract with him by a fraudulent representation that he was of full age, he is not estopped from asserting his infancy in order to avoid the contract; nor can he be charged with the loss which may arise from the invalidity of the contract, as damage caused by his fraudulent representation, in an action founded on the fraud as a substantive wrong (c). In an action at law upon the contract, to which infancy is pleaded, the fraudulent misrepresentation does not constitute matter for replication upon equitable grounds; for infancy is an answer in equity, as well as at law, to any proceeding upon the contract (d). But a Court of Equity will not allow the legal privilege of infancy to be used for the purpose of fraud, and will compel restitution of what has been obtained by an infant through a contract induced by the fraudulent representation that he was of full age (e).

**Liability of infant in respect of property.**—Where a person by means of a contract becomes possessed of real estate or other permanent property to which certain obligations are incident, he remains liable to those obligations as long as he continues possessed of the property; and he cannot avoid them simply on the ground that he was an infant at the time of making the contract under which he has acquired the property; in order to discharge himself from such obligations he must not only disaffirm the contract, but must also disclaim, and get rid of the property. Thus, if an infant lessee takes possession, he becomes liable to the rent and other obligations incident to the estate, so long as he remains in possession, and until he disagrees to the estate (f).

(a) *Jennings v. Rundall*, 8 T. R. 335; and see *Burnard v. Haggis*, 14 C. B. N. S. 45; 32 L. J. C. P. 189.

(b) Per Lord Kenyon, *Bristow v. Eastman*, 1 Esp. 172.

(c) *Johnson v. Pye*, 1 Lev. 169; 1 Keb. 913; *Price v. Hewett*, 8 Ex. 146; and see *Liverpool Adelphi Loan Ass. v. Fairhurst*, 9 Ex. 422; *Wright v. Leonard*, 11 C. B. N. S. 258; 30 L. J. C. P. 365.

(d) *Bartlett v. Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57.

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(e) *Id.*; *Ex p. Unity Joint Stock Banking Ass.*, 3 De G. & J. 63; 27 L. J. B. 33; and see *Nelson v. Stocker*, 4 De G. & J. 458; 28 L. J. C. 760.

(f) *Kirton v. Elliott*, 2 Bulstr. 69; S. C. nom. *Ketley's case*, Brownl. 120; *Ketsey's case*, Cro. Jac. 320; and see *North Western Ry. Co. v. M'Michael*, 5 Ex. 114, 126; *Evelyn v. Chichester*, 3 Burr. 1717.

So, in an action against the registered holder of shares in a railway company for calls due upon the shares, the plea that when he was registered as the holder of the shares, and when he became indebted, he was an infant, was held bad; because it showed that the interest in the shares remained vested in him, and the obligation to pay was incident to the interest in the shares (*a*). Nor, in such case, is it sufficient for the defendant to plead, besides the infancy at the time of acquiring the shares, that he had derived no advantage from them and had never ratified or confirmed the purchase of them (*b*).

But where the defendant, charged by a railway company with calls on shares, pleaded that he became the holder of the shares under the subscription contract, and that at the time of contracting he was an infant, and that while he was an infant he repudiated the contract, and gave notice to the company that he held the shares at their disposal, the plea was held good; because it showed that the defendant had done all he could to disclaim the shares, and that his name remained on the register only by the fault of the plaintiffs in not striking it out (*c*).

**Money paid by infant under a contract.**—Where an infant has paid money under a contract for which the consideration remains executory, he may repudiate the contract and recover the money paid, as upon an entire failure of consideration. Thus, a minor having signed a written agreement to purchase a share of a business at a certain price, and to pay down part of the purchase money as a deposit, which was to be forfeited on breach of the agreement, he was held entitled on coming of age, having then taken no benefit under the agreement, to repudiate it altogether, and to recover the amount of the deposit in an action for money received for his use (*d*).

But if the infant has in part received the consideration, though he may disaffirm the contract, he cannot recover the money paid under it because the failure of consideration is not complete. Thus, an infant having paid a sum as a premium for a lease, which he enjoyed during his minority, but avoided after coming of age, it was held that, though he might avoid the lease and escape the burden of the rent and covenants, he could not recover the sum paid as a premium, because he had partially enjoyed the consideration for it (*e*); and where an infant had paid a sum of money for admission into a partnership and had executed the deed of partnership and acted as partner, receiving money out of the profits, he was held not to be entitled to recover the

(*a*) *Cork and Bandon Ry. Co. v. Caze-  
nove*, 10 Q. B. 935; *Birkenhead Railway  
Co. v. Pilcher*, 5 Ex. 121.

(*b*) *North-Western Ry. Co. v. M'Mi-  
chael*, 5 Ex. 114.

(*c*) *Newry and Enniskillen Ry. Co. v.  
Coombe*, 3 Ex. 565.

(*d*) *Corpe v. Overton*, 10 Bing. 252.

(*e*) *Holmes v. Blogg*, 8 Taunt. 508.

money (a). So, though an infant who buys things, not necessities, cannot be compelled to pay for them; yet, having paid for them, he cannot recover back the money (b).

**Ratification after full age.**—A person after attaining the age of twenty-one years may ratify and confirm a contract made by him during infancy, and so make it absolutely binding (c). “The principle on which the law allows a party, who has attained his age of twenty-one years, to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound” (d).

By Lord Tenterden’s Act, 9 Geo. IV. c. 14, s. 5, it is enacted, “that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.” The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, has not taken away the necessity of the ratification being signed by the party himself; although it has done so in the analogous case of promises to pay debts barred by the Statute of Limitations, by giving effect to such promises when signed by an agent of the party (e).

The ratification of a promise made during infancy has been compared to the ratification of an act of an agent, and it has been laid down that, apart from Lord Tenterden’s Act, “any act or declaration which recognizes the existence of the promise as binding is a ratification of it, as, in the case of agency, anything which recognizes as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it;” and that under Lord Tenterden’s Act, “any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification” (f). A writing signed by the defendant containing an admission of the debt, was held sufficient to satisfy the statute, although without address, or date, and not stating the amount of the debt, or the name of the creditor, these matters being supplied by parol evidence (g). A ratification will be presumed to have been made after full age in the absence of evidence to the contrary (h). If

(a) *Ex p. Taylor*, 8 De G. M. & G. 254; 25 L. J. B. 35.

(b) Per Lord Kenyon, *Wilson v. Kearse*, Peake Ad. Ca. 197.

(c) *Cohen v. Armstrong*, 1 M. & S. 724; *Williams v. Moor*, 11 M. & W. 256, 266.

(d) *Williams v. Moor*, 11 M. & W. 256, 264.

(e) See s. 13; *post*, Chap. XIII, Sect. XI, “Limitations.”

(f) *Harris v. Wall*, 1 Ex. 122, 130; and see *Mawson v. Blane*, 10 Ex. 206.

(g) *Hartley v. Wharton*, 11 A. & E. 934; *Hunt v. Massey*, 5 B. & Ad. 902.

(h) *Hartley v. Wharton*, *supra*.

the original contract made by the infant was by deed, it can only be ratified by deed, or by something amounting to an estoppel in law of as high authority as the deed itself (*a*).

**Ratification of liability incident to property.**—In cases where the infant has by means of contract become possessed of property having obligations and liabilities incident to it which he might disaffirm on coming of age, he should do so within a reasonable time, otherwise the fact of retaining possession of the property may operate as a confirmation of the transaction (*b*). Thus, an infant who takes a lease of land, by continuing in possession after coming of age, affirms the contract, and is liable for the rent and covenants (*c*). So, if an infant makes a lease, and accepts rent after coming of age, he thereby affirms the lease, and precludes himself from avoiding it on the ground of infancy (*d*). An infant who has been admitted to a copyhold estate, and has retained possession after coming of age, affirms the admittance, and is liable for the fines due upon it (*e*). An infant who was registered as the holder of shares in a company, by permitting his name to continue registered after he came of age, was held to have ratified his ownership of the shares (*f*). So, an infant member of a partnership, who did nothing to disaffirm the partnership upon coming of age, was held to continue as partner, and to be liable on contracts subsequently made by the firm (*g*).

**Limited and conditional ratification.**—The ratification may be made upon a condition or to a limited extent. Thus, a person may promise to pay a debt incurred during infancy “when he is able;” and such new promise is binding upon him conditionally on his becoming able to pay (*h*).

**Right of infant on contract.**—A contract made with an infant, although voidable by the infant, is binding on the other party to it until avoided; and it cannot be avoided by him on the ground of the infancy of the person with whom he has contracted. In an action on a contract containing mutual promises of marriage, the defendant pleaded the infancy of the plaintiff; but the Court held that the contract was not void, but only voidable at the election of the infant; and that, though the infant has the privilege of election, the party with whom he has contracted has not, but is bound to the infant (*i*). It is not necessary for an infant to wait until he comes of age in order

(*a*) *Baylis v. Dineley*, 3 M. & S. 477.

(*b*) See *ante*, p. 513; *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181; *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; *Holmes v. Blogg*, 8 Taunt. 85.

(*c*) *Kirton v. Elliott*, 2 Bulstr. 69; S. C. nom. *Ketley's Case*, Brownl. 120; nom. *Ketsey's Case*, Cro. Jac. 320; see *Baylis v. Dineley*, 3 M. & S. 477, 481.

(*d*) *Ashfield v. Ashfield*, Sir W. Jones, 157.

(*e*) *Evelyn v. Chichester*, 3 Burr. 1717.

(*f*) *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; and see *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181.

(*g*) *Goode v. Harrison*, 5 B. & Ald. 147.

(*h*) *Cole v. Saxby*, 3 Esp. 160.

(*i*) *Holt v. Clarencieux*, 2 Str. 937.

to bring an action upon a contract; he may sue upon it, by his next friend, during his minority (a). But a Court of Equity will not grant specific performance of a contract in favor of an infant, because the remedy is not mutual (b); after the infant has come of age and has adopted the contract, he may obtain specific performance (c).

**Contract of infant for necessities.**—An infant may validly contract to pay for necessities supplied to him suitable to his condition in life. “An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards” (d).

The principles upon which the law determines what are necessities for which an infant may validly contract to pay are explained in the judgment in the case of *Chapple v. Cooper*, as follows:—“Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence attendance may be the subject of an infant’s contract. Then the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the ills with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases, it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself” (e).

(a) *Warwick v. Bruce*, 2 M. & S. 205.

(b) *Flight v. Bolland*, 4 Russ. 298.

(c) *Clayton v. Ashdown*, 9 Vin. Abr. 393, pl. 4.

(d) Co. Lit. 172 a.

(e) 13 M. & W. 252, 258; and see *Peters v. Fleming*, 6 M. & W. 42; *Whar-ton v. Mackenzie*, 5 Q. B. 606.

In accordance with the above principles, it has been decided that a livery for a servant may be necessary for an infant requiring such an attendant (*a*); a horse may be necessary (*b*); regimental clothes may be necessary for an infant who is a member of a volunteer corps (*c*); dinners supplied to an undergraduate at the university at his private rooms are *prima facie* not necessities (*d*).

As the law permits an infant to make a valid contract of marriage, all necessities furnished to his wife and children are, in point of law, necessities for the infant; and a contract for necessities supplied to an infant's wife and legitimate children is good, and cannot be avoided on the ground of infancy, any more than a contract for food or education supplied to the infant himself (*e*). So an infant may validly contract for the funeral of his deceased wife, as a necessary; and so, likewise, may an infant widow validly contract for the funeral of her deceased husband (*f*). A marriage settlement suitable to her estate and condition is necessary for an infant upon her marriage; and if she retains a solicitor to prepare it, the liability to pay his bill is transferred by the marriage to the husband (*g*).

An infant may contract a debt for necessities, notwithstanding he has a sufficient income to supply himself with ready money (*h*); and the party supplying necessities to an infant is not, as a general rule, bound to inquire into his circumstances before giving credit to him (*i*); but the fact of the infant being properly provided with any article is material with regard to the question of the necessity of a further supply of the same article (*j*).

Whether articles supplied are necessary or not, within the above description, is a question of fact for the jury to decide (*k*).

**Securities given by infant for necessities.**—An infant cannot be charged on a bill of exchange accepted by him even for necessities (*l*); nor on an account stated in respect of a debt due for necessities (*m*); nor can an infant bind himself by executing a *cognovit* (*n*), or a bond (*o*) for a debt due for necessities. Where an infant borrowed

(*a*) *Hands v. Slaney*, 8 T. R. 578.

(*b*) *Harrison v. Fane*, 1 M. & G. 550; *Hart v. Prater*, 1 Jur. 623.

(*c*) *Coates v. Wilson*, 5 Esp. 152.

(*d*) *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, 5 Q. B. 606.

(*e*) *Chapple v. Cooper*, 13 M. & W. 252, 259; and see *Turner v. Trisby*, 1 Stra. 168.

(*f*) *Chapple v. Cooper*, 13 M. & W. 252.

(*g*) *Helps v. Clayton*, 17 C. B. N. S. 553; 34 L. J. C. P. 1.

(*h*) *Burghart v. Hall*, 4 M. & W. 727.

(*i*) *Brayshaw v. Eaton*, 5 Bing. N. C. 231; *Dalton v. Gib*, 5 Bing. N. C. 198.

(*j*) *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Burghart v. Angerstein*, 6 C. & P. 690.

(*k*) *Peters v. Fleming*, 6 M. & W. 42; *Harrison v. Fane*, 1 M. & G. 550; *Wharton v. Mackenzie*, 5 Q. B. 606.

(*l*) *Williamson v. Watts*, 1 Camp. 552; and see *Harrison v. Cotgreave*, 4 C. B. 562.

(*m*) *Trueman v. Hurst*, 1 T. R. 40; *Ingledew v. Douglas*, 2 Stark. 36.

(*n*) *Oliver v. Woodroffe*, 4 M. & W. 650.

(*o*) Co. Lit. 172 *a*; *Baylis v. Dineley*, 3 M. & S. 477, 482.



money for the purpose of providing himself with necessaries, and afterwards devised his lands to trustees for payment of his debts, the debt contracted during infancy was held to be within the trust (a).

*Contracts with married women (b).*

**Liability of married woman upon contract made by her.** A married woman is legally incapable during marriage of making a contract to bind herself personally (c).

By the rules of procedure in actions at law a wife cannot sue or be sued alone without joining her husband as a joint party with her, except where her husband is civilly dead (d). If she sues or is sued alone, and the objection arises only on the ground of the irregularity of procedure in not joining the husband, and not upon the merits of the action, as where the action is upon a contract made by the wife before marriage, the objection can only be taken by a plea in abatement (e); but if a married woman is sued alone upon a contract made after marriage, the defence that she is incapable of binding herself by contract is a defence upon the merits of the action, and may be pleaded in bar (f). A married woman cannot be sued jointly with her husband on promises made after the marriage, because from her incapacity of contracting it is impossible she can be bound (g). The defence of coverture must be specially pleaded (h).

In the case of a contract made with a married woman, which is executory on her part, as she is incapable of binding herself, the contract is void for want of consideration; thus, where a person delivered furniture to a married woman under a contract of hire, it was held that the contract was void and did not divest him of the present right to the possession of the goods, which, therefore, could not be taken in execution at the suit of the husband's creditors (i).

A married woman, being unable to contract, cannot renew her liability for a debt incurred before marriage, so as to take it out of the operation of the statutes of limitation (j).

**Contract induced by fraud of married woman.**—"As a general rule, a married woman is answerable for her wrongful acts, including

(a) *Marlow v. Pitfield*, 1 P. Wm. 558.

(b) As to the effect of marriage upon contracts previously made, see *post*, Chap. XVII, Sect. III, "Assignment of Contracts by Marriage."

(c) See the second resolution of all the judges in *Manby v. Scott*, 2 Smith's L. C. 5th ed. 375; *Morris v. Norfolk*, 1 Taunt. 212; *France v. White*, 1 M. & G. 731.

(d) *Hatchett v. Baddeley*, 2 W. Bl.

1079, 1082; *Lean v. Schutz*, 2 W. Bl. 1195, 1199.

(e) *Milner v. Milnes*, 3 T. R. 627; *Lovell v. Walker*, 9 M. & W. 299.

(f) *Burch v. Leake*, 7 M. & G. 377.

(g) See *France v. White*, 1 M. & G. 731.

(h) Reg. Gen. 8 T. T. 1853; *Moss v. Smith*, 1 M. & G. 228.

(i) *Smith v. Plomer*, 15 East, 607.

(j) See *post*, Chap. XIII, Sect. XI, "Limitations."

frauds, and she may be sued in respect of such acts, jointly with her husband, or separately if she survives him. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made liable, under color of a wrong, exempts her from liability, even for fraud, where it is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction" (*a*). Thus, an action will not lie against husband and wife for a fraudulent representation by the wife that she was unmarried, whereby the plaintiffs were induced to take her promissory note (*b*). Where the wife fraudulently represented that a bill of exchange was accepted by her husband, whereby the plaintiff was induced to discount it, the Court was equally divided as to whether an action would lie; the judges on the one side holding that the fraudulent representation was in the nature of a warranty or contract, and the judges on the other side holding that it was not connected with any contract (*c*). Where a married woman signed a promissory note with the description "widow," it was held that such representation did not bind her by way of estoppel, but that under the plea of coverture she might prove that she was married at the time of making the note (*d*).

**Liability of married woman, when husband is civilly dead.—**

If the husband is civilly dead, the wife may sue or be sued alone and acquires a capacity to make a contract which binds herself personally (*e*). The husband is deemed to be civilly dead, and the wife may be sued alone on her contract, where the husband is under sentence of transportation (*f*); and, formerly, the husband was so deemed, when he was professed in religion (*g*).

A married woman does not acquire a separate capacity by reason of her husband being an alien, though he resides abroad (*h*); nor by his becoming an alien enemy (*i*); nor by his becoming bankrupt, and absconding to avoid surrendering, and residing abroad (*j*).

(*a*) *Liverpool Adelphi Loan Ass. v. Fairhurst*, 9 Ex. 422, 429; 23 L. J. Ex. 163, 165; see *Wright v. Leonard*, 11 C. B. N. S. 258, 266; 30 L. J. C. P. 365, 367.

(*b*) *Liverpool Adelphi Loan Ass. v. Fairhurst*, 9 Ex. 422.

(*c*) *Wright v. Leonard*, 11 C. B. N. S. 258; 30 L. J. C. P. 365.

(*d*) *Cannam v. Farmer*, 3 Ex. 698.

(*e*) Co. Litt. 132 b; *Hatchett v. Baddeley*, 2 W. Bl. 1079, 1082; *Lean v. Schutz*, 2 W. Bl. 1195, 1199; *Jones v. Smith*, 3 M. & W. 526, 527. Under such circumstances she may be made bankrupt, see *Ex p. Franks*, 7 Bing. 762; and may make a will, *In the goods of Coward*, 34 L. J. P. 120.

(*f*) *Carrol v. Blencow*, 4 Esp. 27; see *Ex p. Franks*, 7 Bing. 762; *In the Goods of Coward*, 34 L. J. P. 120.

(*g*) Co. Litt. 132 b.

(*h*) *Stretton v. Busnach*, 1 Bing. N. C. 139; *Barden v. Keverberg*, 2 M. & W. 61, 64.

(*i*) *De Wahl v. Braune*, 1 H. & N. 178; 25 L. J. Ex. 343; see *Derry v. Duchess of Mazarine*, 1 L. Raym. 147; Salk. 646; *Barden v. Keverberg*, 2 M. & W. 61, 65.

(*j*) *Williamson v. Dawes*, 9 Bing. 292; and see *Marsh v. Hutchinson*, 2 B. & P. 226.

**As sole trader by custom of London.**—By the custom of the City of London a married woman may carry on business as a sole trader in the city, and may bind herself by contracts made in the way of the business; but the husband must be joined in an action against her, even in the city courts (*a*).

**Effect of separation by agreement.**—A man and his wife cannot by any act or agreement change their legal relationship and character, so as to enable the wife to contract and render her liable to an action, as if she were sole and unmarried. Accordingly, a wife, living apart from her husband under a deed of separation by which her husband had secured to her a separate maintenance, was held not to be liable on a contract made by her (*b*); and a wife, who had separated from her husband and was living in open adultery, was held not liable on a contract made by her in that state (*c*).

**Divorce.**—A sentence of divorce *a mensa et thoro* pronounced in the Ecclesiastical Court did not affect the legal incapacity of the wife to bind herself by contract (*d*). The Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, took away the jurisdiction of the ecclesiastical courts in matrimonial matters and established the Court for Divorce and Matrimonial Causes, which has power under the Act, in certain cases, to declare a marriage to be dissolved: the effect of which is to restore the wife to the position of a single woman (*e*); and the Court has power, in certain other cases, to pronounce a decree for a judicial separation.

**Judicial separation.**—By that Act, s. 26, it is enacted that “in every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use.”

**Order of protection of property.**—By the same Act, s. 21, it is

(*a*) *Beard v. Webb*, 2 B. & P. 93; and see *Caudell v. Shaw*, 4 T. R. 361; a married woman, as a sole trader in London, may become bankrupt, and her assignees are entitled to her trade effects and debts. *Lavie v. Phillips*, 3 Burr. 1776.

(*b*) *Marshall v. Rutton*, 8 T. R. 545.  
 (*c*) *Meyer v. Haworth*, 8 A. & E. 467.  
 (*d*) *Faithorne v. Blaquiere*, 6 M. & S. 73; *Lewis v. Lee*, 3 B. & C. 291.  
 (*e*) See *Wells v. Malbon*, 31 Beav. 48; 31 L. J. C. 344.

enacted to the effect that a wife deserted by her husband may obtain an order of a magistrate or of the Court protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. And "the wife shall during the continuance of such order of protection be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." An order of protection obtained by a wife under this section, though it protects the property acquired by her since the commencement of the desertion, does not entitle her to maintain an action commenced before the date of the order (a).

**Effect of contracts upon her separate property in equity.**—In equity a married woman may have property settled to her separate use, which she may dispose of in the same manner as if she were a *feme sole*. In exercise of her right of disposing of her separate property she may charge it with the liability to satisfy contracts made by her; and an engagement or security entered into by her, showing an intention to charge her separate property, will have that effect (b).

It is presumed, in general, that a contract or engagement made by a married woman in writing imports an intention to charge her separate estate, otherwise the writing would have no meaning; if not in writing, it must be proved that the engagement was entered into with an intention on the part of the married woman of charging her separate estate, in order to render it subject to the liability (c). Thus, the bonds, bills of exchange, and promissory notes of a married woman, are presumptively payable out of her separate estate (d).

The separate estate of a married woman has been held liable to the payment of her solicitor's bill of costs incurred upon her retainer (e); also for rent under an agreement made by her to take a lease of a house (f). But it seems that the separate estate of a married woman cannot be charged with contracts implied in law against her without any

(a) *Midland Ry. Co. v. Pye*, 10 C. B. N. S. 179; 30 L. J. C. P. 314.

(b) *Hulme v. Tenant*, 1 Bro. C. C. 16; *Francis v. Wigzell*, 1 Madd. 258, 261; *Aylett v. Ashton*, 1 My. & Cr. 105, 111; *Owens v. Dickinson*, Cr. & Ph. 48; *Shattock v. Shattock*, L. Rep. 2 Eq. 182; 35 L. J. C. 509; *Ex p. Matthewman*, 36 L. J. C. 90.

(c) See *Heatley v. Thomas*, 15 Ves. 596; *Shattock v. Shattock*, L. Rep. 2

Eq. 182, 192; 35 L. J. C. 509, 515; *Vaughan v. Vanderstegen*, 2 Drew. 165, 180; 23 L. J. C. 793, 798; *Johnson v. Gallagher*, 30 L. J. C. 298.

(d) *Tullett v. Armstrong*, 4 Beav. 319, 323; see cases cited by L. J. Turner, in *Johnson v. Gallagher*, 30 L. J. C. 298, 306.

(e) *Murray v. Barlee*, 3 M. & K. 209.

(f) *Gaston v. Frankum*, 2 De G. & Sm. 561.

specific engagement on her part, as an implied contract to repay money received by her for the use of another (*a*).

If a married woman has property settled to her separate use for life only with a general power of appointment by deed or will, she must duly exercise the power in order to charge the property after her death, otherwise the property will pass as in default of appointment; and the execution of the power will operate only according to the terms of the instrument of execution, so that her debts and engagements are not charged upon the property unless she has so appointed. The mere execution by a married woman of a general power by will does not render the property assets for payment of creditors, as in the case of such execution of a power by a person other than a married woman (*b*).

Upon the death of a married woman possessed of separate property absolutely, it seems that the debts and engagements charged upon it are payable, as charges, in order of priority, and not *pari passu*, as in the course of administration of assets (*c*).

In equity, a married woman may contract with her husband in respect of her separate estate, and in reference to any matter as to which she can be regarded for the purpose of the contract as in the position of a *feme sole* (*d*).

The doctrine that a married woman having separate property could bind herself by contract at law was laid down and acted upon by Lord Mansfield, C. J. (*e*), but overruled by the unanimous decision of all the judges in the case of *Marshall v. Rutton* (*f*).

**Rights of married woman under contracts made with her (*g*).**—A person may become bound by a contract made with a married woman; and the husband acquires the right to intervene and claim the performance of it.

The husband may sue alone upon contracts made in favor of his wife during the coverture (*h*); as, upon a bond given to the wife the husband may sue during the coverture in his own name (*i*). So, upon a promissory note made to a wife in her name during the coverture

(*a*) *Jones v. Harris*, 9 Ves. 486; *Aguilar v. Aguilar*, 5 Madd. 414; *Wright v. Chard*, 4 Drew. 673; 29 L. J. C. 82.

(*b*) *Vaughan v. Vanderstegen*, 2 Drew. 165; 23 L. J. C. 793; *Shattock v. Shattock*, L. Rep. 2 Eq. 182; 35 L. J. C. 509; see *Jenney v. Andrews*, 6 Madd. 264.

(*c*) *Shattock v. Shattock*, L. Rep. 2 Eq. 182, 194; 35 L. J. C. 509, 516.

(*d*) *Vansittart v. Vansittart*, 4 K. & J. 62; 27 L. J. C. 222.

(*e*) *Corbett v. Poelnitz*, 1 T. R. 5, ad-

hered to in *Compton v. Collinson*, 2 Bro. C. C. 377, 385; 1 H. Bl. 334.

(*f*) 8 T. R. 545: see *Murray v. Barlee*, 3 M. & K. 209; 221.

(*g*) As to the effect of marriage upon contracts previously made, see *post*, Chap. XVII, Sect. III, "Assignment of Contracts by Marriage."

(*h*) See *Bidgood v. Way*, 2 W. Bl. 1236, 1239.

(*i*) *Day v. Pargrave*, cited 2 M. & S. 396.

the husband may sue in his own name only (*a*); and the husband alone can indorse it (*b*); the wife cannot indorse it in her own name, and can indorse it in her husband's name only as his agent and with his authority (*c*).

**Contract made with husband and wife jointly.**—On a bond or covenant made to both husband and wife jointly, the husband may sue alone (*d*). On a bond given to a husband and his wife, as administratrix of a deceased person, it was held that the husband might sue alone as if the bond were made to himself (*e*). A lease was made by a husband and wife, and the covenants were made to them jointly; it was held that the husband might sue alone upon the covenants, as being in legal effect made to himself alone (*f*).

**Where wife may be joined with husband in suing upon contract.**—Where the promise is made to the wife upon a consideration moving from her, or, as it is termed, where the wife is the meritorious cause of action, the husband may assent to give the wife an interest in the contract, and join her in the action (*g*). A promise was made to a married woman, in consideration that she should cure a certain wound, to pay unto her £10; it was held that the wife might be joined in the action, because the consideration was a performance by her; and that the action would survive to the wife upon the death of the husband (*h*). A husband and wife declared as joint plaintiffs upon a promise made in consideration of a cure done by the wife, and also in a second count for the price of medicines, etc., provided: upon a general demurrer, it was held that the wife could not join, for that she was not the sole cause of the action, because the medicines, etc., were the husband's own property; but that if the action had been brought for the labors of the wife only, she might well have joined (*i*).

So, a promissory note made to a wife in her own name is presumed to be made upon a consideration moving from her, and the husband may join the wife in suing upon it (*j*). On a covenant made to the husband and wife in a lease of the wife's lands, the wife may be joined in the action (*k*); but where a lease of the wife's lands was expressly made by the husband alone, it was held that the wife could

(*a*) *Burrough v. Moss*, 10 B. & C. 558; and see *Howard v. Oakes*, 3 Ex. 136, 140; and see *M'Neillage v. Holloway*, 1 B. & Ald. 218.

(*b*) *Mason v. Morgan*, 2 A. & E. 30; *Dawson v. Prince*, 27 L. J. C. 169.

(*c*) *Connor v. Martin*, 1 Str. 516; *Barlow v. Bishop*, 1 East, 432; and see *Cotes v. Davis*, 1 Camp. 485.

(*d*) *Arnold v. Revault*, 1 B. & B. 443; *Ankerstein v. Clark*, 4 T. R. 616.

(*e*) *Ankerstein v. Clark*, *supra*.

(*f*) *Arnold v. Revault*, *supra*; see *Hill v. Saunders*, 4 B. & C. 529.

(*g*) See *Bidwood v. Way*, 2 W. Bl. 1236, 1239; *Rose v. Bowler*, 1 H. Bl. 108, 114.

(*h*) *Brashford v. Buckingham*, Cro. Jac. 77.

(*i*) *Holmes v. Wood*, cited in *Weller v. Baker*, 2 Wils. 414, 424.

(*j*) *Philtiskirk v. Pluckwell*, 2 M. & S. 393.

(*k*) *Aleberry v. Walby*, 1 Str. 229 and see *Arnold v. Revault*, *supra*.

not be joined (*a*). A promise was made to a husband and wife in consideration of their forbearance to proceed upon a cognovit given in a previous action in which the wife had been joined as co-plaintiff; it was held that the wife, being to the extent of her interest in the consideration the meritorious cause of action, she might be joined with the husband in an action on the promise (*b*).

**When wife may sue alone.**—Where a promise is made to the wife upon a consideration moving from her, as in the cases above cited, she may sue alone, subject to being met by a plea in abatement on the ground of the irregularity of procedure in a married woman suing without joining her husband; but her coverture forms no defence to the action upon the merits and cannot be pleaded in bar (*c*). Thus on a covenant to pay an annuity to a married woman, she may sue alone; and the coverture of the plaintiff is matter only for plea in abatement, and cannot be pleaded in bar (*d*). So, on a promissory note given to a wife in her own name only, she may sue alone, subject only to a plea in abatement of the non-joinder of her husband (*e*). A married woman bought railway stock with money earned by herself, and had it transferred to her own name; it was held that she might maintain an action against the railway company for the dividends, and that, the company not having pleaded the non-joinder of her husband in abatement, she was entitled to recover (*f*).

**When wife cannot sue.**—If the promise is made to the wife, merely as agent for the husband and for his use and benefit, as where the consideration for the promise is the property, goods or money of the husband, he is solely entitled to it in his own right, and can sue only in his own name, and the wife cannot be joined (*g*). In an action brought by husband and wife on a promise made to them jointly in respect of the use and occupation of land, judgment for the plaintiffs was reversed in error upon the ground that the declaration was bad in not stating any interest of the wife in the land, and that no intendment could be made to that effect, even after judgment (*h*). So, husband and wife cannot jointly sue upon an account stated, unless it is averred and proved to have been stated concerning a debt due in right of the wife, or for which she was the meritorious cause of action (*i*).

**Authority of wife to contract as agent for husband.**—Though

(*a*) *Harcourt v. Wyman*, 3 Ex. 817.  
 (*b*) *Nurse v. Wills*, 4 B. & Ad. 739; 1 A. & E. 65.

(*c*) See *ante*, p. 519.

(*d*) *Bendix v. Wakeman*, 12 M. & W. 97.

(*e*) *Guyard v. Sutton*, 3 C. B. 153.

(*f*) *Dalton v. Midland Counties Ry.*

*Co.*, 13 C. B. 474; and see *Ness v. Angas*, 3 Ex. 805.

(*g*) See *Holmes v. Wood*, cited in 2 Wils. 424; *Bidgood v. Way*, 2 W. Bl. 1236; *Johnson v. Lucas*, 1 E. & B. 659.

(*h*) *Bidgood v. Way*, 2 W. Bl. 1236.

(*i*) *Johnson v. Lucas*, 1 E. & B. 659.

a wife is incapable of making a contract to bind herself personally, she is, in some cases, invested with authority to contract as agent for her husband (*a*). The husband is not bound by a contract made by his wife without authority, expressed or implied; and the party seeking to charge him with contracts made by his wife must show that she was invested with authority so to bind him.

A wife may acquire authority to bind her husband in two ways:—

1. During cohabitation with her husband she has a presumed authority to contract for him in those matters which are entrusted to her management.

2. If the husband refuses to maintain her, unless for a sufficient cause, she becomes invested by law with an authority to supply herself with necessaries upon his credit.

**Authority presumed from cohabitation**—1. A wife, during cohabitation with her husband, has a presumptive authority to contract for her husband in all matters which are usually entrusted to a wife, as for the supply of goods for the use of herself and household suitable to the condition in which they live (*b*). Similarly, a woman living with a man, as his wife, and represented by him to be his wife, though they are not married, is presumed to have authority to bind him by her contracts for articles suitable to that station which he permits her to assume (*c*). A wife who is permitted by her husband to remain the mistress of his establishment, though he has separated from her, has the same authority (*d*).

**Revocation of authority**.—The authority of the wife arising from mere cohabitation may be revoked by the husband; and it is sufficient if such revocation is notified to the wife without notice of it reaching the party dealing with her (*e*).

The existence of the authority of the wife during cohabitation is a question of fact for the jury to decide; but there is a presumption in favor of the authority in the absence of evidence to the contrary (*f*).

**Authority of wife to procure necessaries**.—2. A wife may also have authority to bind her husband from necessity. This necessity arises where the husband fails in his duty to maintain his wife, and she has no funds to maintain herself. A husband is bound by law to main-

(*a*) The authority of a wife to contract on behalf of her husband belongs, strictly speaking, to the subject of agency, which is treated hereafter (see p. 265); but it is thought more convenient to place it here in connection with the personal capacity of a married woman.

(*b*) *Montague v. Benedict*, 2 Smith, L. C. 5th ed. 408; *Seaton v. Benedict*, *ib.* 415; *Lane v. Ironmonger*, 13 M. & W. 368; *Reid v. Teakle*, 13 C. B. 627; *Renaux v. Teakle*, 8 Ex. 680; *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

(*c*) *Munro v. De Chemant*, 4 Camp. 215; *Blades v. Free*, 9 B. & C. 167; and see *Ryan v. Sams*, 12 Q. B. 460.

(*d*) *Norton v. Fazan*, 1 Bos. & P. 226; explained by Willes, J., *Cooper v. Lloyd*, 6 C. B. N. S. 519, 521.

(*e*) *Jolly v. Rees*, 15 C. B. N. S. 628; 33 L. J. C. P. 177. Byles, J., *dissentiente*, as to the validity of the revocation without notice to the other party.

(*f*) See the cases cited above.



tain his wife in a manner suitable to his station in life (a) ; and if he fails to supply such maintenance, except under certain circumstances which justify him in withholding it, his wife has an authority to pledge his credit to procure it, which is based upon necessity (b). As long as the husband is able and willing to maintain his wife in his own house, there is no necessity for her seeking maintenance elsewhere, and she has no authority to pledge his credit to obtain it (c).

Where the conduct of the husband is such as to compel the wife to leave his house, it is equivalent to a refusal on his part to maintain her there ; and unless she is provided with a sufficient maintenance she is entitled to pledge his credit for necessities elsewhere (d). Thus, where she leaves the husband's house under a reasonable apprehension of personal violence, she is so entitled (e) ; and it seems that the husband, by living in adultery with another woman in the house, would justify his wife leaving it, and entitle her to pledge his credit for necessities (f). Where the husband was unable himself to maintain his wife, by reason of being confined in a lunatic asylum, it was held she had an authority to pledge his credit for necessities (g).

The authority of the wife, arising from the refusal of the husband to maintain her, to provide herself with necessities upon his credit cannot be revoked or extinguished by the husband, even by an express notice to the person who supplies her with necessities (h).

**Where wife has sufficient funds.**—The wife is under no necessity, and has no authority in law to pledge her husband's credit, if she has in fact sufficient funds to provide for herself necessities suitable to her condition in life (i). A decree for alimony obtained by the wife is held to be *prima facie* evidence that the sum is sufficient in amount, the decree being founded on proof given to the Court of the situation in life of the parties (j). An agreement made between the husband and wife, upon a separation by mutual consent, as to the amount of her allowance is *prima facie* evidence of its sufficiency ; and the husband cannot be charged without proof of its insufficiency (k).

(a) See the first resolution agreed by all the judges in *Manby v. Scott*, 2 Smith's L. C., 5th ed. 375.

(b) *Manby v. Scott*, 1st resolution *supra* ; *Read v. Legard*, 6 Ex. 636 ; 20 L. J. Ex. 309 ; *Johnson v. Sumner*, 3 H. & N. 261 ; 27 L. J. Ex. 341.

(c) *Child v. Hardyman*, 2 Str. 875 ; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200 ; *Johnson v. Sumner*, 3 H. & N. 261, 266 ; 27 L. J. Ex. 341, 344.

(d) Per Lord Kenyon, *Hodges v. Hodges*, 1 Esp. 441 ; *Boulton v. Prentice*, 2 Str. 1214 ; S. C. Selwyn's N. P. 12th ed. 334.

(e) *Houlston v. Smyth*, 3 Bing. 127.

(f) *Ib.* 130 ; dissenting from *Horwood v. Heffer*, 3 Taunt. 421.

(g) *Read v. Legard*, 6 Ex. 636 ; and see *Davidson v. Wood*, 32 L. J. C. 400.

(h) *Boulton v. Prentice*, 2 Str. 1214 ; Selw. N. P. 12th ed. 334 ; and see *Etherington v. Parrot*, 1 Salk. 118 ; per Lord Campbell, L. C., *Jenner v. Morris*, 3 De G. F. & J. 45, 51 ; 30 L. J. C. 361, 362.

(i) *Hodgkinson v. Fletcher*, 4 Camp. 70 ; *Liddlow v. Wilmot*, 2 Stark. 82 ; *Holt v. Brien*, 4 B. & Ald. 252 ; *Mizen v. Pick*, 3 M. & W. 481 ; *Johnson v. Sumner*, 3 H. & N. 261 ; 27 L. J. Ex. 341.

(j) *Willson v. Smyth*, 1 B. & Ad. 801.

(k) *Johnson v. Sumner*, 3 H. & N. 261 ; 27 L. J. Ex. 341.

But if the alimony under the decree, or the allowance under the agreement, is not paid, the wife is under a necessity to pledge her husband's credit for her maintenance, and has authority to do so (*a*). Where a husband on separation from his wife transferred property to trustees for her separate use, but it did not appear that the trustees had accepted the property, or that the wife had received any of it, the husband was held liable for necessities supplied to her (*b*); and where the wife's separate property is not sufficient to afford her proper maintenance, the husband is bound to contribute (*c*).

**Adultery of wife.**—A husband is not bound to maintain his wife after she has committed adultery (*d*); and if he refuses to maintain her, she has no authority in law to pledge his credit for her maintenance (*e*).

**Necessity of wife must be proved.**—Where the wife is living separate from her husband, there is no presumption that she has authority to bind him, even for necessities; and it lies upon the party seeking to charge the husband for necessities supplied to her to prove that she has not in fact sufficient means to provide herself with necessities, and is living apart from her husband under such circumstances as entitle her to render him liable (*f*).

**What are necessities.**—Where a wife is entitled to procure her necessary maintenance at her husband's expense, the question may arise as to what are necessities for which he may be charged, and is one of fact to be decided by the jury (*g*). Furniture for a house may be necessary for a wife in a station of life requiring her to live in a furnished house (*h*). Where it became necessary for a wife to exhibit articles of the peace against her husband, it was held that he was liable for the costs of an attorney employed by her on that occasion (*i*); and that an allowance made to her for maintenance could not be considered as applicable to that purpose (*j*). A prosecution of the husband for an assault on his wife was held to be a matter for which the

(*a*) *Nurse v. Craig*, 2 B. & P. N. R. 148; *Hunt v. De Blaquiere*, 5 Bing. 550; and see *Keegan v. Smith*, 5 B. & C. 375.

(*b*) *Burrett v. Booty*, 8 Taunt. 343.

(*c*) See *Davidson v. Wood*, 32 L. J. C. 400.

(*d*) *R. v. Flintan*, 1 B. & Ad. 227; see *Hope v. Hope*, 27 L. J. P. & M. 43.

(*e*) *Govier v. Hancock*, 6 T. R. 603; *Atkyns v. Pearce*, 2 C. B. N. S. 763; 26 L. J. C. P. 252; *Cooper v. Lloyd*, 6 C. B. N. S. 519.

(*f*) Per Abbott, C. J., *Mainwaring v.*

*Leslie*, M. & M. 18; 2 C. & P. 507; *Edwards v. Towels*, 5 M. & G. 624; *Ozard v. Darnford*, 1 Selw. N. P. 12th ed. 331; *Mizen v. Pick*, 3 M. & W. 481; *Johnson v. Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341.

(*g*) *Hunt v. De Blaquiere*, 5 Bing. 550.

(*h*) *Hunt v. De Blaquiere*, *supra*.

(*i*) *Shepherd v. Mackoul*, 3 Camp. 326.

(*j*) *Turner v. Rookes*, 10 A. & E. 47.

husband could not be made liable to pay the cost (*a*). The costs of a proctor, employed by a wife in prosecuting a suit against her husband for a divorce on the ground of cruelty, may be recovered as a necessary, if there was reasonable cause for the suit (*b*).

A husband is not liable at law for money lent to his wife, though it was borrowed, and afterwards applied by her for the purpose of paying debts previously contracted for necessities, or for the purpose of procuring necessities for which she might have pledged his credit (*c*). A wife was requested by her husband to join him abroad, and borrowed money to enable her to pay her passage, which she did; it was held that the lender could not recover the amount from the husband (*d*). But in Equity, if a person lends money to a wife, being then entitled to charge her husband for necessities, and she expends it in necessities; or if a person pays money in discharge of the debts for necessities supplied to the wife, he is entitled to charge the husband with the amount so lent or paid (*e*).

**Ratification by husband of wife's contracts.**—A husband may become liable upon contracts made by his wife, in excess of her authority, if he subsequently ratifies them. Thus, the husband may become liable to pay for articles ordered by his wife, without his authority, if he sanctions the use of them; and a husband may be taken to have sanctioned the use of, and so become liable for articles of dress or jewellery which his wife has ordered upon his credit, by seeing her wear them without disapprobation (*f*). So, where he has control over the goods improperly ordered by his wife, and does not return them (*g*). The husband may ratify the contract conditionally; and he then becomes liable only upon fulfilment of the condition; as, where goods had been supplied to his wife without his authority, and he subsequently promised to pay for them if he was not arrested, it was held that the creditor could charge him only subject to the condition as to the arrest (*h*).

*Contracts with persons in a state of insanity.*

**Insanity.**—A person may be afflicted with mental insanity to such a degree as to render him incapable of understanding the matter of an agreement; but he is presumed by law to be of sound mind and capable of understanding an agreement until the contrary appears.

(*a*) *Grindell v. Godmond*, 5 A. & E. 755.

(*b*) *Brown v. Ackroyd*, 5 E. & B. 819; 25 L. J. Q. B. 193.

(*c*) *Knox v. Bushell*, 3 C. B. N. S. 334.

(*d*) *Ib.*

(*e*) *Harris v. Lee*, 1 P. Wms. 482; Vol. 1.—34.

*Jenner v. Morris*, 3 De G. F. & J. 45; 30 L. J. C. 361.

(*f*) See *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28; 2 Smith, L. C. 5th ed. 408, 415.

(*g*) *Waithman v. Wakefield*, 1 Camp. 120.

(*h*) *Holt v. Brien*, 4 B. & Ald. 252.

Hence, every person, in his dealings with another, is entitled to consider him of sound mind, and capable of contracting, until he has notice to the contrary. But if a person enters into an agreement with another, knowing him to be at the time of unsound mind, and thereby incapable of understanding the agreement, he cannot enforce such agreement; if he brings an action upon it, the defendant may avoid its effect by pleading that he was insane at the time of making the agreement, and thereby incapable of understanding it, to the knowledge of the plaintiff (a).

A lunatic may be charged upon his contracts for necessities supplied to him suitable to his condition and wants, notwithstanding the party supplying them had notice of his insanity (b); the maintenance of his wife is a necessary for which a lunatic may be so charged (c).

In the case of *Molton v. Camroux*, a lunatic had purchased certain annuities for his life of an assurance company which, at the time, had no knowledge of his unsoundness of mind; it was held that, after his death, his personal representatives could not avoid the transaction, and recover back the premiums paid for the annuities. In that case the Court founded their judgment chiefly on the circumstance that the contract had been completely executed, so that the parties could not be restored to their original position (d).

In the case of *Beavan v. M'Donnell* the plaintiff had entered into an agreement with the defendant for the purchase of an estate on certain conditions, under which he had paid a deposit, and the defendant had delivered an abstract of title and was ready and willing to complete the sale; at the time of making the agreement the plaintiff was insane and incapable of understanding the meaning of it, but the defendant was not aware of his insanity; it was held, upon the principle of *Molton v. Camroux*, that the plaintiff was not entitled to avoid the contract and recover back the amount of the deposit (e). In the same case (f), upon the issue whether the defendant had notice of the insanity of the plaintiff, it was held that evidence of insane conduct, both before and after the signing of the contract, was admissible to show that the nature of the insanity was such that the defendant must have been aware of its existence.

A court of equity will not grant specific performance of a contract made by a person in a state of insanity, although the other party had

(a) *Sentance v. Poole*, 3 C. & P. 1; *Browne v. Joddrell*, 3 C. & P. 30; *Dane v. Kirkwall*, 8 C. & P. 679; *Molton v. Camroux*, 2 Ex. 487, 501; *Beavan v. M'Donnell*, 9 Ex. 309; 10 Ex. 184; and see *Gore v. Gibson*, 13 M. & W. 623.

(b) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; and see *Wentworth v. Tubb*, 1 You. & Col. C. C. 171.

(c) *Read v. Legard*, 6 Ex. 636.

(d) *Molton v. Camroux*, 2 Ex. 487; affirmed in Ex. Ch. 4 Ex. 17; and see *Elliot v. Ince*, 7 De G. M. & G. 475, 487; 26 L. J. C. 821, 824.

(e) 9 Ex. 309; 23 L. J. Ex. 94.

(f) *Beavan v. M'Donnell*, 10 Ex. 184; 23 L. J. Ex. 327.

no notice of the insanity, and took no advantage of it (*a*); but the Court will not set aside a contract on the mere ground of the insanity of one of the parties, the other party having dealt with him on the faith of his being of competent understanding (*b*). The Court will grant specific performance of a contract made during a lucid interval, notwithstanding subsequent insanity, provided the remedy can be given; no act of the insane person being required, as a conveyance, which the plaintiff is not willing to dispense with (*c*).

**Intoxication.**—A person who is deprived of his reason by intoxication is regarded by law, as to his capacity of contracting, in much the same light as a person of unsound mind. If a person, at the time of making an agreement, is so intoxicated as to be incapable of understanding the meaning of it, the other party being aware of his state, he may afterwards avoid the agreement, and may answer an action brought against him upon it, by the plea that he was intoxicated at the time of making it, to the knowledge of the plaintiff (*d*). “There is this distinction,” it has been observed, “between the case of lunacy and that of intoxication: in the latter case the incapacity of the party is patent,—in the former, it may not be in the least degree visible” (*e*).

It is said that a person may be liable for the price of actual necessities supplied to him whilst in a state of intoxication (*f*).

The principles upon which equity deals with contracts made by a person when in a state of intoxication have been explained by Sir W. Grant, M. R., in the following terms (*g*):—“A court of equity ought not to give its assistance to a person who has obtained an agreement, or deed, from another, in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of any agreement, or deed, merely upon the ground of his having been intoxicated at the time (*h*): I say merely upon that ground; as, if there was, as Lord Hardwicke expresses it in *Cory v. Cory* (*i*), any unfair advantage made of his situation, or, as Sir Joseph Jekyll says in *Johnson v. Medlicott* (*j*), any contrivance or management to draw him into drink, he might be a proper object of relief in a court of equity.” Acting upon these principles,

(*a*) *Hall v. Warren*, 9 Ves. 605; and see *Frost v. Beavan*, 17 Jur. 369; 22 L. J. C. 638.

(*b*) *Niell v. Morley*, 9 Ves. 478; and see *Elliott v. Ince*, 7 De G. M. & G. 475, 488; 26 L. J. C. 821, 825.

(*c*) *Id.*; *Owen v. Davies*, 1 Ves. sen. 82.

(*d*) *Gore v. Gibson*, 13 M. & W. 623; *Hamilton v. Grainger*, 5 H. & N. 40; and see *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126.

(*e*) Per Alderson, B., *Molton v. Camroux*, 2 Ex. 487, 491.

(*f*) See *Gore v. Gibson*, 13 M. & W. 623, 627.

(*g*) *Cooke v. Clayworth*, 18 Ves. 12, 15; and see *Shaw v. Thackray*, 1 Sm. & Gif. 537, 540.

(*h*) *Dunnage v. White*, 1 Swanst. 137.

(*i*) 1 Ves. 19.

(*j*) 3 P. Wms. 130.

the Court has refused to set aside an agreement merely upon the ground that the plaintiff was intoxicated when he made it, where it did not appear that he was deprived of his reason, or that any unfair advantage was taken of his condition (a); and the Court has decreed specific performance of an agreement against a party who was in a slight degree intoxicated when he made it (b).

(a) *Cooke v. Clayworth*, 18 Ves. 12.

Ex. 586; *Shaw v. Thackray*, 1 Sm. &

(b) *Lightfoot v. Heron*, 3 You. & Col.

Gif. 537.

## CHAPTER VII.

### CAPACITY OF PARTIES.

#### SECTION I.—INFANTS.\*

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#### *Ex parte* KIBBLE.

IN THE COURT OF APPEAL IN BANKRUPTCY, MARCH 11, 1875.

[*Reported in Law Reports, 10 Chancery Appeals, 373.*]

THIS was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

On the 5th of November, 1874, a joint debtor's summons was issued against Mr. A. P. L. Onslow by four creditors for four separate debts, namely, Emanuel Emanuel, for 258*l.* 3*s.* 2*d.*; W. Kibble, for 53*l.* 18*s.* 7*d.*; H. C. Green, for 14*l.* 14*s.*; and R. A. Green, for 29*l.* 6*s.*

The consideration for all these debts was jewelry and money supplied to A. P. L. Onslow during his infancy. He attained his majority on the 25th of August, 1874.

Kibble's debt, on which the adjudication of bankruptcy was eventually founded, was for a dishonored bill of exchange dated the 18th of May, 1874, and drawn in his favor by A. P. L. Onslow on his mother for 50*l.*, payable at four months after date, in consideration of jewelry and advances of money. After he attained his majority, Kibble brought an action against him in the Court of Queen's Bench, under the Bills of Exchange Act (18 & 19 Vict. c. 67); and on the 22nd of October, 1874, obtained a judgment against him by default for the amount claimed in the debtor's summons.

It was admitted that Kibble, when he supplied the jewelry and money, knew that Onslow was an infant.

The debtor was warned by the summons that unless he complied with it he would have committed an act of bankruptcy, in respect of which he might be adjudged a bankrupt on a bankruptcy petition being presented by the said E. Emanuel, W. Kibble, H. C. Green, and R. A. Green.

The debtor filed an affidavit in which he swore that he was not

\* Ch. IV, Sect. I, Finch.

indebted to the creditors in the aggregate sum claimed, and that the whole of the debts were contracted by him before he attained the age of twenty-one years, and were not necessities, and that the debts had not been ratified by him since he attained his majority.

On the hearing of the summons on the 8th of December, 1874, the Registrar ordered that, upon the debtor entering into the usual bond for such sum as E. Emanuel should recover in an action against him, and upon payment of the sum of 53*l.* 18*s.* 7*d.* within three days to Kibble, all proceedings under the summons should be stayed as regarded these debts, and that all proceedings should be stayed with regard to the other debts, without security, till after actions had been brought for recovering the several debts.

The debtor not having paid Kibble his debt of 53*l.* 18*s.* 7*d.* within the time limited, he filed a petition for adjudication of bankruptcy against him founded on the debtor summons, the other creditors not joining in the petition.

Mr. Registrar Hazlitt was of opinion that there was no petitioning creditor's debt by reason of the infancy of the debtor at the time when the goods were supplied, and he accordingly dismissed the petition; and from this decision Kibble appealed.

Mr. *E. C. Willis* (Mr. *Roxburgh*, Q. C. with him), for the Appellant:—

We rely upon the judgment obtained against the debtor after he attained his majority. We admit that the Court of Bankruptcy will sometimes investigate the consideration for a judgment, but that is only in cases where fraud or collusion has been proved. In the present case there was nothing of the kind. Mr. Onslow's mother was aware of all the circumstances, and accepted the bill drawn by him. But if the judgment in this case can be opened, there was good consideration for it. The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), which came into operation on the 7th of August, 1874, only applies to contracts made after the passing of the Act, and therefore does not touch either the original debt or the bill of exchange in this case. The bill is therefore not void, but only voidable; and although Onslow might have pleaded his infancy in the action, he did not do so, and the judgment operates as a ratification of the contract.

Mr. *Winslow*, Q. C. (Mr. *Bagley* with him), for the bankrupt:—

There are two objections to this adjudication. First, that the alleged petitioning creditor's debt was void; and, secondly, that the debtor's summons could not support the petition. As to the first point, it is clear that the Court of Bankruptcy is not bound by a judgment at law, but is in the habit of investigating the consideration for it: *Ex parte Bryant* (a); *Ex parte Marson* (b). If otherwise, a debtor might elude all his just creditors by allowing judgments to be taken by default

(a) 1 V. & B. 211, 214.

(b) 3 Mont. & A. 155.



against him by friends. In the present case there would have been no consideration to support the judgment, even before the Infants' Relief Act, 1874, as it was founded on the bill of exchange, and a bill of exchange signed by an infant has always been held absolutely void, because an infant cannot trade: *Smith on Contracts (a)*. But even if there was a consideration before the late Act, it is now taken away. It is true that the 1st section only applies to contracts made after the passing of the Act, but the 2nd section prevents any valid ratification being made of contracts made in infancy, and that section applies equally to ratifications of contracts entered into before or after the Act (*b*).

In the second place, we say that the petition for adjudication was irregular. Four creditors joined in the debtor's summons. There is no authority in the Act for this; but if several creditors do join in a debtor's summons, they ought to join in the petition for adjudication.

Mr. *Willis*, in reply, referred, on the first point, to *Harris v. Wall (c)*: *Ex parte Prescott (d)*; and, on the second point, to Forms 4, 5, and 6, in the schedule annexed to the Bankruptcy Rules, 1870, which contemplate more than one creditor joining in the debtor's summons.

SIR W. M. JAMES, L. J.:—

I am of opinion that the decision of the Registrar in this case was quite right. It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation. In the present case a bill of exchange had been drawn by an infant for jewelry purchased and money advanced to

(a) Page 209.

(b) 37 & 38 Vict. c. 62, s. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Sect. 2: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(c) 1 Ex. 122.

(d) 1 M. D. & D. 199.

him. It is not pretended that there was any ratification of the original debt or of the bill of exchange after the infant came of age, until the judgment was allowed to go by default against him, under the Bills of Exchange Act. The only question, therefore, is, whether the consideration for the judgment has not been taken away by the Infants' Relief Act, 1874. The first section enacts that all contracts thenceforth entered into by infants shall be absolutely void: and then the 2nd section provides that no action shall be brought upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy. When the Act says that no action shall be brought, it must mean that the promise or ratification shall not be a good cause of action: so that a ratification made after the Act of a contract made in infancy before the Act is as void as a contract made by an infant after the Act. Therefore, on this ground, I think the Registrar came to a right conclusion.

But as the other question, respecting the form of the summons and the petition for adjudication, has been raised before us, it is right to express our opinion on that also. It appears to me very inconvenient that a number of creditors should club together to take out a debtor's summons, although that course appears to be sanctioned by the forms annexed to the Rules of 1870. I give no opinion against the power of creditors to do this, but I think that if they do unite in this way they must all stand or fall together; and if a petition for adjudication is presented, they must all join in it. The summons cannot be dealt with piecemeal, so that one debt can be made an act of bankruptcy, and security required for another, and a third dealt with in some other way. It is impossible to work out a debtor's summons in that way.

SIR G. MELLISH, L. J.:—

I am of the same opinion. It is quite clear that in the Court of Bankruptcy the consideration for a judgment may be investigated particularly when the judgment has gone by default. I do not mean to say that this rule applies to such an extent that in every case in which a Defendant has a good defence to an action and does not plead it, as, for instance, where he had no notice of dishonor of a bill of exchange, the Court of Bankruptcy would allow the creditors to go behind the judgment. The real question must always be whether there was a good consideration for the debt, and we have therefore to consider whether there was a good consideration in this case. If the Act of 1874 had not passed, I should have doubted whether, as the debt was one which was capable of being ratified in writing, there was not a good consideration for the judgment. But, having regard to the facts of the case, I think that the effect of the Act is to prevent there being any consideration for the judgment. The case is not

touched by the 1st section, because the bill of exchange was drawn before the Act was passed. But when the Act came into operation the bill had not become due, and the infant was still under age: and the effect of the 2nd section was to prevent any action from being brought on the bill, although it might have been ratified after the infant came of age. For I am of opinion that that section applies to all contracts made by an infant, provided the ratification is made after the passing of the Act; and that it is to be understood as saying that a debt contracted in infancy shall not in future in any case form a valid consideration on which an action can be brought. The statute in effect places a debt contracted during infancy in the same position as a gambling debt; and a bill of exchange given for a gambling debt cannot form the ground for an action. Even if the debtor does not plead that it was for a gambling debt, and lets the judgment go against him, still the Court of Bankruptcy would go behind the judgment and declare the debt void.

I also agree with the Lord Justice as to the form of the debtor's summons. If several creditors join in a debtor's summons, they must stand or fall together.

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RYDER v. WOMBWELL.

IN THE EXCHEQUER CHAMBER, DECEMBER 3, 1868.

[*Reported in Law Reports, 4 Exchequer Cases, 32.*]

APPEAL from the decision of the Court of Exchequer making absolute so much of a rule as called on the plaintiff to show cause why a verdict found for him for 40*l.* 15*s.* should not be reduced by 15*l.* 15*s.*; and discharging the residue of it, which called upon him to show cause why a nonsuit should not be entered; or a new trial had, on the ground of the improper rejection of evidence (a).

The declaration was for money payable for goods sold and delivered. Plea: Infancy. Replication: Necessaries. Issue thereon.

At the trial before Kelly, C. B., at the London sittings after Trinity Term, 1867, it appeared that the plaintiff sought to recover for the following (among other) articles of jewelry supplied by him to the defendant, a minor:—First, a pair of crystal, ruby, and diamond solitaires, 25*l.*; and, secondly, a silver gilt antique chased goblet, engraved with an inscription, 15*l.* 15*s.*

The defendant was the younger son of a deceased baronet of large property in Yorkshire, and during his minority had an income of about

500*l.* per annum, and on attaining his majority he came into 20,000*l.* He had no residence of his own, but occasionally stayed at Limmer's Hotel, Bond Street, London; his home was his mother's house in London, and his brother's in Yorkshire, at each of which he was boarded and lodged gratuitously. He pursued no trade or profession, he moved in the highest society, and was in the habit of riding races for his friends, amongst others for the Marquis of Hastings, at whose house he was a frequent visitor, and for whom the goblet was intended, as the plaintiff knew when he supplied it, as a present. The solitaires were ornamental studs or buttons worn by gentlemen as fastenings for the wristbands of the shirt; they were made of crystals set in gold, and ornamented with diamonds representing a horse-shoe in which the nails were represented by rubies.

Evidence was offered on the part of the defendant, that, at the time of the purchase of the solitaires, he had purchased similar articles of jewelry to a large amount from other tradesmen, which rendered any further supply by the plaintiff unnecessary; but, as it was proved that the plaintiff was not aware of this fact, the Lord Chief Baron rejected the evidence.

The jury, in answer to the questions left to them by the learned judge, found that the solitaires and the goblet were necessities suitable to the estate and condition in life of the defendant, and a verdict was accordingly entered for the plaintiff for 40*l.* 15*s.*, being the price of the solitaires and goblet, with leave to move to enter a nonsuit if the Court should be of opinion that there was no evidence for the jury that either article was a necessary; or to reduce the damages by the price either of the solitaires or the goblet, if the Court should be of opinion that there was evidence for the jury in respect of one or other of these articles only. A rule nisi was obtained accordingly, and also for a new trial, on the ground of the improper rejection of the evidence offered on the part of the defendant, that the defendant was, at the time he purchased the solitaires of the plaintiff, supplied already, although not to the knowledge of the plaintiff, with similar articles. This rule was afterwards made absolute to reduce the verdict by 15*l.* 15*s.*, the price of the goblet, and discharged as to the residue; the majority of the Court being of opinion that the verdict of the jury as to the solitaires ought not to be disturbed, and that the evidence offered to prove that the defendant, when the solitaires were supplied, was already sufficiently supplied with articles of a similar description, was, under the circumstances, properly rejected.

June 20, 1868. *Bulwer*, Q. C. (*Mayd* with him), for the defendant, contended, first, that a nonsuit ought to be entered, as there was no evidence proper to be left to the jury that the solitaires were necessities. In addition to the cases referred to in the Court below, he

cited *Rainsford v. Fenwick* (a); *Greene v. Chester* (b); *Ive v. Chester* (c); and *Whittingham v. Hill* (d); to show that in former times, when a more precise and accurate form of pleading prevailed, the facts relied upon as showing that the goods supplied were necessities were stated upon the record, and the Court were enabled to give judgment whether in point of law the replication was sufficient. But when it was established (see Coke's Entries, Debt. 8, p. 125, and *Huggins v. Wiseman*) (e) that the plaintiff might reply in the general form now in use, it became necessary that the facts which used formerly to be stated on the record should be found by a jury, and then the Court had to determine, as formerly, whether the facts found did, in point of law, furnish an answer to the plea. He contended, secondly, that the evidence was improperly rejected; and on this point referred to the following additional authorities: *Story and Another v. Perry* (f); *Cook v. Deaton* (g); *Ford v. Fothergill* (h); *Steedman v. Rose* (i); *Berroles v. Ramsay* (j); *Brayshaw v. Eaton* (k); *Foster v. Redgrave* (l); Chitty on Contracts, 6th ed. pp. 136, 137, 140; Leake on Contracts, p. 233.

*Popham Pike* (Coleridge, Q. C., with him), for the plaintiff, contended that the question whether the solitaires were necessities was rightly left to the jury, and that they had come to a right conclusion. He cited, in addition to the authorities quoted in the Court below, *Hands v. Slaney* (m).

(a) Carter, 215.

(b) 2 Rolle, 144.

(c) Cro. Jac. 560.

(d) Cro. Jac. 494.

(e) Carth. 110.

(f) 4 C. & P. 526.

(g) 3 C. & P. 114.

(h) 1 Esp. 211.

(i) Car. & M. 422.

(j) Holt, N. P. 77.

(k) 7 Scott, 183.

(l) Queen's Bench, Feb. 9, 1867.—*Foster v. Redgrave*.—This was a cause tried before Keating, J., at the Berkshire summer assizes, 1866. The declaration was on the common counts for goods sold and delivered, &c. Plea: Infancy. Replication: Necessaries.

It appeared on the trial that the defendant, an undergraduate at Oxford, had, whilst a minor, been supplied by the plaintiff, a tradesman in Oxford, with a number of articles of clothing which were admitted to be "necessaries" prima facie. The defence was, that the defendant was, at the time the goods were ordered and supplied, already provided with an ample wardrobe. It was not suggested, however, that the plaintiff knew of this fact.

The learned judge left it to the jury to say whether, under these circumstances, the goods supplied were necessities. The jury found that they were, and a verdict was thereupon entered for the plaintiff, with leave to move to enter a nonsuit. A rule was afterwards obtained accordingly on the ground that the defendant, being already fully supplied with articles of the same description as those sold to him by the plaintiff, those could not be "necessaries," and therefore that the plaintiff was not entitled to recover.

*J. O. Griffiths* showed cause, and contended that, unless the plaintiff was proved to have had knowledge that the defendant was already sufficiently provided with articles of a similar description to those supplied, his right to recover remained unaffected by the circumstance that, in point of fact, the defendant was so provided.

The COURT (Blackburn and Mellor, JJ.) without calling on Huddleston, Q. C., to support the rule, made it absolute on the authority of *Bainbridge v. Pickering* (2 Wm. Bl. 1325), and *Brayshaw v. Eaton* (7 Scott, 183).

(m) 8 T. R. 578.

With regard to the rejection of evidence, there was no case similar to the present. In all of those cited in order to show that the evidence was admissible, though not brought to the plaintiff's knowledge, there were peculiarities. Either they were cases of husband and wife, or else of minors, in respect of whom there was a presumption that they were already supplied with all necessities by reason of their living in their father's houses, or of their being *in statu pupillari*. Again, in many of the cases cited the tradesmen had peculiar facilities for knowing the actual position of the minor. Putting aside particular and exceptional cases there seemed to be no difference between a minor being actually supplied with goods similar to those for the price of which he was being sued, and his being in the receipt of an income sufficient to buy them if he chose. Yet the amount of an infant's income had been held immaterial: *Brayshaw v. Eaton (a)*. Why should the amount of his income when he had turned his money into goods be material?

*Bulwer, Q. C., in reply.*

*Cur. adv. vult.*

Dec. 3, 1868. The judgment of the Court (Willes, Byles, Blackburn, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. In this case the plaintiff replied to a plea of infancy, that the goods were necessities suitable to the degree, estate and condition of the defendant, and on this issue was taken. On the trial before the Lord Chief Baron it was proved that the degree, estate and condition of the defendant was that he was the younger son of a deceased baronet of good fortune and family, that during his minority he had an income of about 500*l.* per annum, and on attaining his majority he became entitled to 20,000*l.*, that he moved in what is called the highest society, and rode races for a friend, the Marquis of Hastings, at whose house he was a frequent visitor. Amongst the articles supplied by the plaintiff upon credit, and which, according to his case and the verdict of the jury, were necessities for an infant of this degree, were a silver-gilt goblet which he ordered for the purpose of making a present to the Marquis of Hastings, price 15*l.* 15*s.*, and a pair of solitaires or ornamental studs, worn as the fastenings of the wristbands of a shirt, which it is stated in the case were made of crystals set in gold and ornamented with diamonds, representing a horse-shoe in which the nails were rubies. The price of these studs or solitaires was 25*l.* No evidence was given of anything peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles.

(a) 7 Scott, 183.

At the close of the plaintiff's case the defendant's counsel offered evidence that the defendant was already supplied with similar articles of jewelry to a large amount, so as to render any further supply unnecessary, but it being admitted that the plaintiff was not aware of this, the Lord Chief Baron rejected this evidence.

Leave was reserved to move to enter a nonsuit or reduce the damages, and the question whether these two articles were, under the circumstances, necessities, was left to the jury, who found for the plaintiff as to both of the articles above mentioned. They found for the defendant as to some other articles which it is consequently not necessary to notice. A rule nisi was obtained in the Court of Exchequer to enter a nonsuit or reduce the verdict pursuant to the leave reserved, or for a new trial on the ground of the improper rejection of evidence.

The rule was by the majority of the Court of Exchequer made absolute, to reduce the damages to 25*l.*, the value of the studs, thus deciding that there was no evidence on which the jury could find that it was necessary for the infant to buy on credit a goblet for the purpose of making a present, but that there was evidence on which they might find that it was necessary for him to buy such studs as are above described, and the rule for a new trial on the ground of the rejection of evidence was discharged. Bramwell, B., dissented from this judgment, as in his opinion there was no evidence to go to the jury (a); and the evidence rejected was admissible.

(a) The judgment of Bramwell, B., was as follows :—"In this case, on a replication to a plea of infancy, the jury have found two articles to have been necessities for the defendant. The articles are, a gold drinking cup, the price of which is 15*l.* 15*s.*, and a pair of things called 'solitaires,' explained to us to mean articles which may be used as studs to fasten the wristbands of a shirt. The price of these solitaires is 25*l.*, owing to their costly material and manufacture, and the jewels with which they are adorned. I believe I am right in saying that studs fit for the purpose, and such as a gentleman may well wear, might be bought for a trifle, or the wristbands may be buttoned with buttons, scores of which may be bought for a few pence. It was said that the question was for the jury, that the rule is that where the article is one of an useful class, the question is one of fact to be decided by them. This argument was principally used in favor of the claim for the solitaires. I cannot agree to this. It is extremely difficult to name anything which cannot be put to some use. Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested. But even they might come within the argument in support of the drinking cup claim, viz., that they might be used for necessary and becoming presents. The argument seems to me to lead to an absurdity. Food is necessary; is it a question of fact whether a daily dinner of turtle and venison for a month is a necessary for a clerk with a salary of 1*l.* a week? A threepenny ride in an omnibus on a wet day may be a necessary for such a clerk, and save him its cost by saving his clothes. Is whether a coach and four is a necessary for him, a question of fact? Besides, suppose a jury ask what is the meaning of necessities. Does it mean in law, as in strictness, something indispensable? The answer must be, no. Then when they ask what is the meaning, and it is expounded to them as being something reasonably required for the nourishment, clothing, lodging, education, and decent behavior and appearance, according to station, how can such an explanation include these articles?"

But I may fairly be asked what is the rule? It seems to me to be this. There are some things which cannot be necessities. The ear-rings, the spectacles in the cases put, the wild animal, and all things which are useless except for amusement, or where the utility is the subordinate consideration and the ornament or amusement

On appeal, therefore, there are two questions raised before us: first whether there was evidence on which the jury might properly find that both or either of those articles were necessities, on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of 40*l.* 15*s.*, or stand reduced to 25*l.*, or be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessities. And as is

the principal. On the other hand, there are some things certainly necessities, bread, meat, vegetables, water. There are also things which may or may not be, and which give rise to questions for a jury. For instance, an infant orders an expensive coat; but it appears his trade or calling is of that nature that such a coat is necessary for his health; or it is shown that a coat at half the price would not last half the time. Or if he has ordered a broadcloth coat, and it is said he should have contented himself with fustian, evidence may be given as to his position, and as to how such people dress in that class in that neighborhood, and then the question is for the jury. I am far from saying that the above is at once accurate and exhaustive, but I forbear from the attempt to make it so. Not to be more tedious, I think, therefore, that in this case the jury should have been told to find for the defendant. If the argument as to the drinking cup is right, and if the tradesman is bound to make no inquiry, why every case is for the jury, as an infant may always have some friend to whom he would like to give the useless article he has purchased. But I cannot see why that argument should be used. An infant must drink, and drink out of some vessel; therefore, the gold cup is in the class of useful articles. If the question was for the jury, still I think such a direction ought to have been given as would have precluded their going wrong, unless they gave a perverse verdict. I think necessities ought to have been so defined and explained as to give them no opportunity of returning a wrong verdict, unless they did so wilfully. Of course, with this opinion I think if there was evidence to go to the jury, still the verdict was wrong, and there should be a new trial. It is observable that no one pledged his oath that these things were necessary, or gave any description of the articles, of their utility, of the cost of other contrivances for the purpose.

Further, I think evidence was admissible to show that the defendant was supplied with similar articles. Suppose a baker delivered 100 loaves daily to an infant, who could only consume one, would he be liable for the price of the other 99? Certainly not; because they were not necessities. But what difference does it make on this question, that they are supplied by one baker or a hundred? The question is like that which arises where a married woman has dealt on credit. There it is a question of authority, here of capacity, depending on whether the woman or infant is sufficiently supplied. No doubt we are not concerned with the goodness or badness of the law, but I cannot help thinking it would be more correctly administered by juries, at least, on this head, if its reason and advantages were properly appreciated. It is not a law for the indemnity and defence of the infant who is sued merely; it is a law to deter people from trusting infants, and so save them from the consequences of the improvidence and inexperience natural to their age, an improvidence which would lead them into loss though all their dealings were with honest people, an inexperience which causes them to be no match for rogues. Modern legislation runs in the same direction of protecting the helpless and invalidating contracts from which they have not the sense or power to protect themselves. I think our judgment should be to enter a verdict for the defendant; if not, to order a new trial: and, in conformity with the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), c. 44, the wrong verdict being no fault of the defendant, without costs." ED.



accurately stated by Parke, B., in *Peters v. Fleming* (a), "From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is; and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out. Then the question in this case is whether there was any evidence to go to the jury that any of these articles were of that description." In the present case the first question is whether there was any evidence to go to the jury that either of the above articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in *Jewell v. Parr* (b), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. London and Brighton Railway Company* (c), Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence,"—the fact in that case to be established. And in *Wheelton v. Hardisty* (d), in the considered judgment of the majority of the Court, it is said, "The question is whether the proof was such that the jury would reasonably come to the conclusion" that the issue was proved. "This," they say, "is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence."

(a) 6 M. & W. at p. 46.

(c) 3 C. B. (N. S.) at p. 150.

(b) 13 C. B. at p. 916.

(d) 8 E. & B. at p. 262.

In this Lord Campbell agreed, though differing as to the result (*a*). And taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends or wear shirt-buttons composed of diamonds and rubies costing 12*l.* 10*s.* a piece.

We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessities. The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessities suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot, be necessities to any one of any rank, or fortune, or condition whatever? This is an important principle which, if correct, fully supports the judgment below, but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist (as it well may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the Court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy.

We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B., in the Court

(*a*) See 8 E. & B. at p. 266.

below, many instances are put well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not *primâ facie* necessary for maintaining a young man in any station of life, and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessities in this special case, and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with this view. In *Peters v. Fleming* (a), the Court took judicial notice that it was *primâ facie* not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself properly in his degree. In laying down the law as to the particular case, Parke, B., says (b): "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder; but as a general rule, and in the absence of some evidence to show that the usages of society required the use of such things, we think the rule laid down in *Peters v. Fleming* (a) is correct. It was approved of in *Wharton v. Mackenzie* (c), where Coleridge, J., says (d), that in some cases it must be for the judge to decide the question. Where evidence is given, as he observes, of exceptional circumstances, the case must go to the jury with proper directions, but in the absence of any explanation the Court will decide. So in *Brooker v. Scott* (e), Parke, B., during the course of the argument, says (f): "*Primâ facie*, these articles are not necessities under the circumstances, and the tradesmen must show them to be so;" and in giving judgment he says (g): "If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them;" and on that ground a nonsuit was entered.

No doubt there are many cases in which the Court have held that such evidence had been given, and that the case could not be withdrawn from the jury, several of which are cited by the Lord Chief Baron in his judgment, but none in which it is laid down that the Court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject, to

(a) 6 M. & W. 42.

(b) 6 M. & W. at p. 47.

(c) 5 Q. B. 606.

(d) 5 Q. B. at p. 612.

(e) 11 M. & W. 67.

(f) 11 M. & W. at p. 68.

(g) 11 M. & W. at p. 69.

take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without.

There is, no doubt, a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the Court below on such a point is reversed, the majority must have been so either in the Court above or the Court below. This is an infirmity which must affect all tribunals. But in the present case we do not think any such case has arisen, for we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were shirt buttons really got for utility, and that the degree of ornament was only accidental, or that the jury were not wrong if they so found, but on the ground that it was not a question for the Court at all.

Taking this view of the law and facts, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In *Bainbridge v. Pickering* (a) the Court of Common Pleas seem to have acted on a principle which would make the evidence admissible. In *Brayshaw v. Eaton* (b), Bosanquet, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn, J., and Mellor, J.) acted in *Foster v. Redgrave* (c). There is much to be urged in support of the view taken by the majority in the Court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the Court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this Court.

*Judgment reversed, and a nonsuit entered.*

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## JENNINGS v. RUNDALL.

IN THE KING'S BENCH, NOVEMBER 12, 1799.

[Reported in 8 Term Reports, 335.]

THE first count in this declaration stated that the plaintiff, on, &c. at the instance and request of the defendant delivered to the defendant a certain mare of the plaintiff to be moderately ridden by the defendant, yet that the defendant contriving and maliciously intending to injure the plaintiff whilst the mare was in the defendant's custody

(a) 2 Wm. Bl. 1325.

(b) 7 Scott, 183.

(c) *Ante*, p. 539, n. (l).

under such delivery and before the same was returned to the plaintiff on, &c. wrongfully and injuriously rode used and worked the said mare in so immoderate excessive and improper a manner, and took so little and such bad care thereof, that by reason of such immoderate, &c. riding, &c. the said mare became and was greatly strained damaged, &c. In the second count it was alleged that the plaintiff at the instance and request of the defendant let to hire and delivered to the defendant a certain other mare to go and perform a certain reasonable and moderate journey, &c. yet that the defendant contriving, &c. wrongfully and injuriously rode and worked the said mare a much longer journey, &c. There was also a count in trover for two mares.

The defendant pleaded his infancy to the two first counts, to which plea the plaintiff demurred.

*Marryat*, in support of the demurrer, (after observing that it was immaterial whether or not infancy could be pleaded to the second count, because it being pleaded to both counts if it were a bad plea as to either count the whole plea was bad,) contended that, as the first count was not founded on a contract but on a tort, the defendant could not plead infancy to it. That that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her or to redeliver her; but that it appeared to be a delivery on bail to the defendant who had abused the plaintiff's property. That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. That the dictum in the books, that if the action arise out of the contract the plaintiff shall not by declaring in tort prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law. That such was the ground of decision in *Grove v. Nevill*, 1 Keb. 778, (said in 1 Keb. 913, 914, to have been decided) where in an action upon the case in nature of a deceit on sale by the defendant of goods as his own, when in truth they belonged to another, the Court said "This is no actual tort, or any thing ex delicto, but only ex contractu." That in *Johnson v. Pie* (a), where the defendant had falsely and fraudulently asserted himself to be of full age, and had as such executed a mortgage to the plaintiff, and where it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff: whereas here is a tortious act done by the defendant, and that too subsequent to the time when any supposed contract could have been

(a) 1 Keb. 905, 913; 1 Lev. 169. The judgment is thus reported:—"Sed per cur: coment infants serront lie p'actual torts, come trespass, etc., queux sont vi et contra pacem, unc'ne serront lie p'ceux q'sound in deceit, car si serront, tous les infants in Angleterre serront ruine, et in cases lou lour contracts ne eux lie serront ch' come pur tort." Ed.

entered into respecting the hire of the mare. He observed that an infant is answerable in an action for slander, *Noy*, 129; because there an act is done by the defendant; and in that case it was said that *malitia supplet ætatem*; so here malice is laid. That in trover an infant is also responsible on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust or violation of some duty. And that even in an action of trespass for mesne profits he cannot plead infancy, though there he becomes a trespasser by construction of law. That if an infant wilfully destroyed anything that had been bailed to him, there is no doubt but that he would be liable in an action for the tort; and that this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

*Wood*, contra, was stopped by the Court.

LORD KENYON, Ch. J. The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to show the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a contract, into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield indeed frequently said that this protection was to be used as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration cannot vary this case.

GROSE, J. I am of the same opinion. In the case of *Manby v. Scott* (a) this distinction was taken, that if the action against an infant be grounded on a contract the plaintiff shall not convert it into a tort; "If one deliver goods to an infant on a contract knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that mean all infants in England would be ruined."

A very few years after the decision of that case the case of *Johnson v. Pie* arose, according to one report of which Lord Ch. J. Keeling expressed great indignation at the attempt to charge an infant in tort for that which was the foundation of an action of assumpsit; he said

(a) 1 Sid. 129.

"The judgment will stay forever, else the whole foundation of the common law will be shaken; for this was but a slip, and he might have pleaded his minority here."

LAWRENCE, J. The true distinction is that mentioned by my Brother Grose, and not that stated at the bar, between negligence and an act done by the infant. It is argued that if no act be done by the infant he may plead his infancy, but that infancy is not a defence where an act has been done: if that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable.

According to the same rule, if an action were brought against an infant for negligently keeping the plaintiff's cattle by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

LE BLANC, J. The plea of infancy is a good bar to this action, on the ground that the act done in this case is the foundation of an action of assumpsit. And the reason of the distinction taken in the case in *Siderfin* is, that the plaintiff shall not by changing the form of the action vary the liability of the infant. Now if the plaintiff could not have maintained an action of assumpsit against the infant, neither can he maintain the action in its present form. On this short ground, therefore, I think that the plea of infancy is a good defence to this action.

*Judgment for the defendant.*

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BURNARD, *Appellant*, v. HAGGIS, *Respondent*.

IN THE COMMON PLEAS, MAY 4, 1863.

[*Reported in 32 Law Journal Reports, Common Pleas, 189 (a).*]

APPEAL from the County Court of Cambridgeshire, holden at Cambridge.

It appeared from the particulars of the plaintiff's claim, that the action was brought to recover the sum of 30*l.* for the damage sustained by the plaintiff by reason of the defendant having, on the 11th of March, 1862, caused the death of the plaintiff's horse. The defendant duly pleaded infancy, according to the statute and rules. The plaintiff's attorney having opened the case as a question of contract as well as of tort, the Judge asked the defendant's attorney if he objected to the particulars of the claim, as he thought they pointed rather to tort than to contract, when the defendant's attorney replied that he did

(a) Reported also in 14 Common Bench, New Series, 45. *Ed.*

not object to them ; and during the trial it was agreed between the plaintiff's and the defendant's attorneys that the question should go to the jury, whether the contract was for a necessary suitable to the defendant's station in life.

Upon the trial the following facts, *inter alia*, appeared in evidence. the plaintiff was a livery-stable keeper residing in Cambridge, and the defendant was an undergraduate of Trinity College, Cambridge, whose father was formerly a surgeon, but for some years past ceased to practise his profession, and was thereupon appointed a magistrate for the county of Somerset. The defendant was born on the 23d of May, 1842.

On the 11th of March, 1862 the defendant, accompanied by a friend named Bonner, who was also an undergraduate of Trinity College, went into the yard of the plaintiff, to whom both of them were strangers, and the defendant stated to the plaintiff's servant, and afterwards to the plaintiff, that he, the defendant, wanted a horse for a ride. A mare was shown to him, and he asked if she would jump. The plaintiff said he had no doubt she would, but he did not let her out for jumping or larking, and that if he, the defendant, wanted a horse for jumping plaintiff could show him a horse for that purpose. The defendant replied that he did not want a horse for jumping, but merely for a ride, and he said he would have the mare, and he directed it to be sent for him. The plaintiff stated, at the trial, that the usual charge for a ride was 7s. 6d., and that he had charged that sum against the defendant, who, however, had not paid it ; and that the usual charge for a horse for jumping or larking was a guinea.

It appeared that, after the mare had been taken by the plaintiff's servant to the place to which it had been directed to be taken by the defendant, it was mounted by Mr. Bonner.

The defendant stated, at the trial, that he hired the mare, and that he did tell the plaintiff, or his servant, that he wanted the mare for Mr. Bonner. The defendant also stated that, on the same day, he hired a horse of another livery-stable keeper, and that he rode that horse and directed Bonner to ride the plaintiff's mare. The defendant and Bonner rode together from Cambridge, and the defendant stated that between Cambridge and the adjoining village of Grantchester they left the highway and rode together across the fields to the adjoining village of Barton, being a distance of about three miles, and in doing so they jumped their horses over several hedges and ditches, and that on Mr. Bonner endeavoring to jump the plaintiff's mare over a fence it fell, and a stake entered its body. The mare was afterwards brought back to the plaintiff's yard, where it was put under the care of a veterinary surgeon, but it died on the 23rd of March, 1862 ; and the jury found that it died from the wound received whilst ridden by



Bonner. The jury also found, *inter alia*, that the defendant was an infant under the age of twenty-one at the time of the contract with the plaintiff; that the plaintiff did not know that the mare was ridden by Bonner; that the hiring of the mare was a contract for a necessary suitable to the defendant's station in life, and that the amount of damage which the plaintiff had sustained was 30*l*.

The learned Judge having, upon the finding of the jury, directed a verdict to be entered for the plaintiff for 30*l*. damages, and having given judgment accordingly, the defendant appealed therefrom, and the question for the opinion of this Court was, whether, under the circumstances, the plaintiff or the defendant was entitled to judgment.

*Wills*, for the appellant. The horse was not a necessary, and the jury should have been directed to have found a verdict for the defendant. Whether any particular article is a necessary or not for an infant is a mixed question of law and fact—*Cripps v. Hill* (a).

[*BYLES, J.* Is not the action here one of tort?]

It was treated at the trial as one of contract, and both parties agreed "that the question should go to the jury whether the contract was for a necessary suitable to the defendant's station in life." The case of *Jennings v. Rundall* (b) shows that an action founded on a contract cannot be converted into one on tort so as to charge an infant defendant. In that case the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant, maliciously intending &c., wrongfully and injuriously rode the mare so that she was damaged; and it was held, that the defendant might plead his infancy in bar, the action being founded on a contract. According to the cases of *Wright v. Leonard* (c) and *Bartlett v. Wells* (d), an infant, though liable for an actual tort, may plead infancy in bar to an action for a wrong connected with a contract. If this action can be treated as founded on a contract, then it is clear that the hiring of the horse by the defendant cannot be considered a necessary without there were some special circumstances, and if there were such, it was for the plaintiff to have shown their existence—*Brooker v. Scott* (e) and *Harrison v. Fane* (f).

*Tozer*, Serj., for the respondent, was stopped by the Court.

*ERLE, C. J.* The question is, whether, under the circumstances stated in this case, the plaintiff or the defendant be entitled to judgment, and I am of opinion that our judgment ought to be for the plaintiff. It appears that the defendant went to the stables of the

(a) 5 Q.B. Rep. 606; s.c. 13 Law J. Rep. (N.S.) Q. B. 130.

(b) 8 Term Rep. 335; ante p. 546.

(c) 30 Law J. Rep. (N.S.) C.P. 365.

(d) 31 Law J. Rep. (N.S.) Q.B. 57 (e) 11 Mee. & W. 67. (f) 1 Man. & Gr. 550.

plaintiff and contracted with the plaintiff for the hire of a horse for a ride on the road, and not to be taken across the fields and used for jumping. The defendant having so got the horse, lent it to his friend, who took it across the fields, and in endeavoring to jump the animal over a fence, transfixed it on a stake. Now it is clear to me that on these facts there has been an actionable wrong committed, for which the defendant is liable independently of the finding of the jury that the hiring of the horse was a necessary suitable to the degree and station in life of this young man. Putting aside all question as to there being evidence or not sufficient to satisfy such finding, I am of opinion that the defendant is legally liable for, and can be made to pay the damage claimed in this action.

WILLES, J. I am of the same opinion. The act of riding this horse at the fence where it met its death is just as much a trespass as if the defendant without any hiring, and without the plaintiff's leave, had mounted the plaintiff's horse and gone with it into the fields and had there used it as this horse was in fact used. What was done by the defendant was not an abuse of a contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal.

BYLES, J. I am of the same opinion. I agree that one cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*. This, however, is the case of a horse hired for one purpose and used for another; and more than that, it was let out to be used by one person and was used by another person; it was let for riding on the road, and was used for jumping over fences in the fields. There was therefore an independent tort, for which the infant was liable, and it is wholly unnecessary to consider any question about what are necessities.

KEATING, J. I am of the same opinion. The defendant was liable for a tort wholly independent of any contract.

*Judgment for the respondent.*

## SECTION II.—LUNATIC AND DRUNKEN PERSONS.\*

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MOLTON AND WIFE, *Administratrix of THOMAS LEE, deceased*, v  
CAMROUX.

IN THE EXCHEQUER, JUNE 13, 1848.

IN THE EXCHEQUER CHAMBER, MAY 29, 1849.

[*Reported in Exchequer Reports, Vol. 2, p. 487, and Vol. 4, p. 17.*]

ASSUMPSIT by the plaintiff, as administratrix of Thomas Lee, against the defendant, as secretary of the National Loan Fund Life Assurance Company, for money had and received to the use of Thomas Lee, and of the plaintiff as his administratrix, and on an account stated.

Plea, non assumpsit.

At the trial of the cause, before Pollock, C. B., at the London sittings after Michaelmas Term, 1846, the jury found certain facts, and the plaintiffs had a verdict, leave being reserved to enter a nonsuit.

*Gurney*, in Hilary Term, 1847, obtained a rule nisi, in pursuance of leave reserved, with leave to turn the facts into a special verdict. A special verdict was agreed upon, which embodied the following facts:—

The present action was brought to recover from the defendant, the secretary of the National Loan Fund Life Assurance Society, two sums of 350*l.*, and 5*l.* 6*s.* 2*d.*, which has been paid by Thomas Lee, the deceased, to the society, under the following circumstances:

Thomas Lee, on the 29th of August, 1843, made a proposal to the said society for the purchase of an annuity of 21*l.* 12*s.* 10*d.* for his life, payable yearly on the 29th of August, the first payment to be made on the 29th of August in the following year, and that he should pay the sum of 350*l.*, as the consideration of that annuity; and on the same day he made a proposal to the said society for the purchase of a deferred annuity of 30*l.* for his life, to commence on his attaining the age of sixty years, which would be on the 30th of June, 1864, the first payment to be on the 30th of June, 1865, reserving to him the option of receiving, in lieu of such annuity, the sum of 293*l.* 5*s.*, payable immediately, or the deferred sum of 377*l.* 5*s.*, to be paid to his representatives after his death. The proposals were assented to and accepted by the society, and the terms of the agreements were embodied in two policies of insurance, bearing date respectively the 29th of August, 1843. The sums agreed upon of 350*l.* and 5*l.* 6*s.* 2*d.* were then paid by the deceased, who subsequently died intestate in 1844,

\* Ch. IV, Sect. III, Finch.

No memorial of these annuities had ever been enrolled in the High Court of Chancery. At the time of the making of these proposals, and of the assenting thereto and acceptance thereof, and of the granting of the said annuities, and of the payment of the said sums by Thomas Lee, the intestate, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the society had not at that time any knowledge. The purchases of the annuities by Thomas Lee were transactions in the ordinary course of the affairs of human life, and the granting of the annuities to him in the manner and upon the terms before mentioned, were fair transactions, and transactions of good faith on the part of the society, and in the ordinary course of their business; and at the time of making the proposals, and at the time they were assented to and accepted by the society, and of the granting of the annuities, and of the payment of the two sums by him, he appeared to the society to be of sound, though he was then in fact of such unsound mind as aforesaid. The society first had notice of the unsoundness of mind of the grantee by letter dated the 23rd of September, 1843, from his solicitors. No commission of lunacy had ever been issued against the grantee. The society had never made any payments in respect of the annuities in question, but had always been ready and willing to pay any sum which might have become due under them, and had never attempted to avoid the agreements.

The plaintiff's points were, that the said Thomas Lee, being of unsound mind, could not make a valid contract of the nature set forth in the verdict; and secondly, that the supposed contracts were void by statute, for want of enrolment. And therefore that the plaintiffs were entitled to recover back the sums of money so paid.

The case was argued in Hilary Term, on the 17th and 21st of January, by

*Needham*, for the plaintiffs. The present case raises two questions for the opinion of this Court. First, whether the personal representatives of a lunatic can recover money which he has paid under a contract with a person who has entered into it bona fide, and without knowledge of the lunacy. Secondly, whether the annuity granted is void for want of enrolment. Upon the first point there is no direct authority; but there are many authorities in support of the principle that a lunatic cannot make a contract to bind his property. Thus, the old writ of *Dum fuit non compos mentis* lay to recover back land which had been aliened by a person not in his right mind (*a*): and it has been held that a person non compos mentis cannot either make or revoke a will (*b*), and the Courts have always held their wills to be void. Nor can a lunatic suffer a recovery, *Hume v. Burton* (*c*), *Keene v.*

¶ (*a*) *Fitz. Nat. Brev.*, 202, (C.)

(*b*) 6 Rep. 23.

(*c*) 1 Ridg. Parl. Cas. 16.

*Keene* (a); nor execute a deed, *Yates v. Boen* (b); nor a bond, *Faulder v. Silk* (c); so he cannot indorse a bill of exchange, *Alcock v. Alcock* (d); nor state an account, *Tarbuck v. Bispham* (e). The rule is the same as respects parol contracts. In *Palmer v. Parkhurst* (f), a bargain by a lunatic, eight years before the lunacy found, was avoided by the party being found a lunatic. [PARKE, B. Was it suggested in that case, that it was known by the defendant, at the time of the bargain, that the party was a lunatic?] It does not appear by the report whether or not he was acquainted with the lunacy. [PARKE, B. We are not able to tell what the form of the plea was in *Alcock v. Alcock*; it does not appear whether there was any allegation of notice or knowledge of the lunacy.] The principle for which the plaintiff now contends is, that a lunatic cannot enter into a binding contract, as he cannot have a consenting mind. [PLATT, B. In *Done v. Viscountess Kirkwall* (g), it was held by Patteson, J., at Nisi Prius, that it was not sufficient to show that Lady Kirkwall was of unsound mind, but that the jury must be satisfied that the plaintiff knew it, and took advantage of it. That ruling was subsequently upheld by the Court of Queen's Bench, in the same case.] In *Clerk v. Clerk* (h), it was held, that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family. So the marriage of a lunatic is void: *Turner v. Meyers* (i). There Sir W. Scott says: "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity; and also that a defect of incapacity invalidates the contract of marriage as well as any other contract." In *Howard v. Lord Digby* (j), Brougham, L. C., says, "The law on this point is as clear, both in equity and in lunacy, and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by will; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute-merchant, staple, a judgment, warrant of attorney, or any other security." [POLLOCK, C. B. Surely a payment by a lunatic would be a good answer to the debt for which the lunatic was liable before his lunacy.] The defence of intoxication stands upon the same principle as that of lunacy; and in the recent case of *Gore v. Gibson* (k), this Court held, that acts done by a man who had lost his senses at the time, are totally void. [PARKE, B. The ancient doctrine, that no man of full age shall be permitted to stultify himself, has been much qualified and restricted in modern times. There is a learned note on this subject, at the end of the report of *Gore v. Gibson*, in the Jurist, vol. 9, p. 142. ALDERSON, B.

(a) Ibid. 91.

(d) 3 M. &amp; Gr. 268.

(g) 8 C. &amp; P. 685.

(j) 2 Cl. &amp; Fin. 661.

(b) 2 Stra. 1104.

(e) 2 M. &amp; W. 2.

(h) 2 Vern. 212.

(k) 13 M. &amp; W. 623.

(c) 3 Camp. 126.

(f) 1 Ch. Ca. 112.

(i) 1 Hagg. C. R. 414.

There is this distinction between the case of lunacy and that of intoxication: in the latter the incapacity of the party is patent—in the former, it may not be in the least degree visible.] In one respect the two cases are analogous: in neither of them has the sufferer a consenting mind. A lunatic is not criminally liable: *Reg v. Oxford* (a). [PARKE, B. It has been held that a lunatic innkeeper is liable for the loss of his guest's goods: *Cross v. Andrews* (b).] There are three exceptions to be found to the rule contended for in the case of lunacy; but these exceptions will, perhaps, be found to strengthen the rule. A fine levied by a person non compos mentis has been held good: *Thompson v. Leach* (c), *Needler v. The Bishop of Winchester* (d); and the reason, as it appears from *Beverley's Case* (e), is, that the act is of a public and notorious character, done in a court of record, and that the Court had the power of judging of the sanity of the party. This is confirmed by stat. 18 Ed. 1, s. 4, the "Modus levandi fines," and 10 Ed. 2, "De finibus;" and by *Mansfield's Case* (f), where a fine had been made by one Bushley, an idiot, "but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparent and visible, yet the fine stood good." The second exception to the general rule is that of a feoffment by a lunatic: *Thompson v. Leach* (g). The Court there said, "There is a difference between a feoffment and a livery made propriis manibus of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in law, and therefore the feoffment is not merely void, but voidable; but surrenders, grants, &c., by an idiot, are void ab initio." The third exception is that of necessities; but these are clearly excepted from the general rule, on the ground that they do not require a consenting mind. Thus, an infant or an idiot may be liable for necessities, as was said in *Mamby v. Scott* (h). The contracts, however, of an infant are only voidable, and not void *Baxter v. Lord Portsmouth* (i) is a leading case upon this branch of the subject. Abbott, C. J., there says: "At the time the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be, that such contracts would bind, although I was not prepared to say that they would not." In

(a) 9 C. &amp; P. 525.

(b) Cro. Eliz. 622.

(c) 3 Mod. 305.

(d) Hob. 220.

(e) 4 Rep. 124.

(f) 12 Rep. 124.

(g) Carth. 435.

(h) 1 Sid. 112.

(i) 5 B. &amp; C. 170.

*Gore v. Gibson* (a), the distinction is clearly pointed out, namely, that, to make a party liable for necessities, it is not necessary that there should be the assent of both parties. Pollock, C. B., there says : " With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract ; but in many cases the law does not require an actual agreement between the parties, but implies a contract, from the circumstances ; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title." [PARKE, B. A fourth exception is mentioned in *Beverley's Case*, viz., a recognizance. ALDERSON, B. Suppose the lunatic is benefited, do you argue that in such case the contract is void ?] It is submitted that it would be. [He also referred to *Niell v. Morley* (b), and *Kent's Commentary*, 451.] In *Turner v. Meyers* (c), Sir W. Scott says : " It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also, that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta in the earlier commentators on the law (d), that a marriage of an insane person could not be invalidated on that account—founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons." [POLLOCK, C. B. I recollect a case where a marriage was set aside, although there was no appearance of lunacy at the time of the offer of marriage.] Pothier, in his *Treatise on Obligation* (e), says : " A contract is a particular kind of agreement ; to understand the nature of a contract, we should, therefore, previously understand the nature of an agreement. An agreement is the consent of two or more persons to form some engagement, or to rescind or

(a) 13 M. &amp; W. 623.

(b) 9 Ves. 478.

(c) 1 Hagg. C. R. 414.

(d) Sanchez. lib. 1, disp. 8, num. 15.

(e) P. 1, c. 1, s. 1, art. 1.

modify an engagement already made, *Duorum vel plurium in idem placitum consensus*." Again, in speaking of persons capable or incapable of contracting, he says (a), "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently, must have the use of his reason, in order to be able to contract." In the Appendix to that article, the distinction is pointed out between persons incapable by law of contracting, and those incapable by nature.

Secondly, the annuity is void, for want of the enrolment of a memorial, in pursuance of the statute 53 Geo. 3, c. 141. [PARKE, B. If the grantor of an annuity chooses to go on paying it, it does not lie in the mouth of the grantee to say that the annuity is void. If any point was ever settled, I should say that was.] The 17 Geo. 3, c. 26, s. 1, declares that all deeds, whereby annuities are granted, shall be null and void to all intents and purposes, unless a memorial be registered in manner prescribed by that act. An opinion has long prevailed, that the statute was intended for the benefit of grantors only, and therefore the word "void" must be construed "voidable;" that doctrine, however, is at variance with the object of the legislature. In *Crosley v. Arkwright* (b), where a person, against whom a fi. fa. issued, was in possession of goods under a deed given in consideration of an antecedent debt and an annuity, of which no memorial had been enrolled, it was held that the sheriff might return nulla bona, for the annuity deed was absolutely void. Buller, J., there says, "The words of this statute are as strong as possible; it makes the deed void to all intents and purposes whatsoever." *Saunders v. Hardinge* (c) also decided, that every deed by which an annuity is secured, and which is not properly registered, is void, not voidable only. In *Denn v. Dolmen* (d), which is to the same effect, Lord Kenyon adverts to the distinction between the language of the 17 Geo. 3, c. 26, s. 1, and that of the Registration Act, 7 Anne, c. 20, s. 1. which declares that a conveyance not registered "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration." Some expressions of Tindal, C. J., in the case of *Cowper v. Godmond* (e), have given rise to a contrary doctrine. That case proceeded on the authority of *Weddel v. Lynam* (f), *Waters v. Mansell* (g), and *Davis v. Bryan* (h); the former of which alone is in point, but, at the same time, is a *Nisi Prius* decision which never received the consideration of the Court in banc. The true mode of construing statutes is to adhere to the ordinary meaning of the words, unless that is at variance with the intention of the legislature: *Becke v. Smith* (i), *Biffin v. Yorke* (j).

(a) Id., art. 4. (b) 2 T. R. 603. (c) 5 T. R. 9. (d) 5 T. R. 641.  
 (e) 9 Bing. 748. (f) 1 Esp. 309. (g) 3 Taunt. 56.  
 (h) 6 B. & C. 651. (i) 2 M. & W. 191. (j) 5 M. & G. 428.



**PER CURIAM:**—We feel no doubt about the last point. Both reason and authority show that it is not competent for the grantee of an annuity, who has omitted to enrol a memorial, to profit by his own default, and set up the want of registration against the grantor. The law was settled by the cases of *Davis v. Bryan* (*supra*), *Churchill v. Bertrand* (*a*), and *Cowper v. Godmond* (*supra*).

*Gurney* for the defendant. It is conceded that an unexecuted contract by a lunatic cannot be enforced; but there is no case in which an executed contract, made for valuable consideration, and without notice of fraud, has been held void. In *Palmer v. Parkhurst* (*b*), the bill charged that the pretended satisfaction was not valuable, and was done in prejudice of the lunatic; the answer did not state it to be valuable. In *Clerk v. Clerk* (*c*) the conveyance was voluntary and without consideration. In *Addison v. Dawson* (*d*) fraud was alleged and proved. *Howard v. Digby* (*e*) shows that the law will sometimes imply a contract, notwithstanding lunacy. The earlier cases do not proceed on the ground, now exploded, that a lunatic cannot stultify himself, but that such contracts are not fair and equal between the parties. On that principle, an exchange, if equal, was held good. Perkins, in his Profitable Book (*f*), says, "And if a man of unsound memory, being seised of land in fee, exchanges the same with a stranger for other land in fee, and the exchange is executed, and he of unsound memory dies, and his heir enters into the land taken in exchange by his father, now he shall not avoid this exchange." So with respect to partition, in Co. Litt, 166 a., it is said, "If coparceners make partition at full age, and unmarried, and of sane memorie, of lands in fee simple, it is good and firm forever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of non sane memorie, it shall bind the parties themselves, but not their issue, unless it be equal." Also in Bac. Abr. tit. "Idiots and Lunatics," (F), it is said, "The feoffment of an idiot or non compos is not void, but voidable, but it cannot be avoided by himself, by entry, &c.; and the reason hereof, given in some books, is as before observed, because no man by law is permitted to disable himself. The better reason in this case seems to be, that, anciently, these feoffments were not only made for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants, in military service or in tillage, and so were presumed to be equally for the benefit of the lord and tenant; and therefore, they were not holden to be void in themselves." A lunatic may grant by fine; for, that proceeding having formerly taken place before a judge, he was presumed to guard against any unfair advant-

(*a*) 2 G. & D. 548.(*b*) Ch. Cas. 113.(*c*) 2 Vern. 413.(*d*) 2 Vern. 673.(*e*) 2 Cl. & Fin. 634.(*f*) Tit. "Exchange," pl. 298

age being taken of the lunatic: *Murley v. Sherren* (a). [PARKE, B. Was it not rather that the Judge was supposed to take care that the party was in a fit state of mind?] The form of pleas in avoidance of contracts, on the ground of lunacy or drunkenness, shows that the inquiry in those cases is as to the transaction being fair; for such pleas invariably contain an averment of notice: *Dane v. Viscountess Kirkwall* (b), *Gore v. Gibson* (c). In *Sentance v. Poole* (d) where the defence of imbecility of mind was set up in an action by indorsee against maker of a promissory note, Lord Tenterden told the jury, that, "should they be satisfied that the defendant was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, they ought to find for him." That learned judge evidently considered, that the mere fact of being imbecile was not sufficient to avoid the contract, without showing that an unfair advantage had been taken. There is no distinction in principle between a contract by a lunatic for necessities or for any other purpose, except that necessities are evidence to show the fairness of the contract. It is true that *Baxter v. The Earl of Portsmouth* (e) was a case of necessities; but the judgment of Lord Tenterden proceeds on the ground, that the only contracts open to dispute are those not executed, or made under circumstances which might have induced a reasonable person to suppose the party was of unsound mind. *Williams v. Wentworth* (f) shows that, in the case of necessities supplied to a lunatic, the law will imply a promise to pay. In *Browne v. Jodrell* (g), the defendant was charged on a contract, as a member of an institution, and Lord Tenterden ruled that unsoundness of mind was no defence, unless it were shown that the plaintiff imposed on the defendant. Reference is there made to a case of *Levy v. Baker*, in which the ruling of Best, J., is to the same effect. *Dane v. Viscountess Kirkwall* (h), and *Clarke v. Metcalf* (i), are also cases in which lunatics were held liable on contracts, though not for necessities. No case has yet decided, that an executed contract, if fair and bona fide, can be questioned on the ground of the lunacy of one of the parties. It is said that a lunatic is not criminally responsible; but the more correct statement would be, that a person being a lunatic cannot be guilty of that which amounts to murder or high treason. [PARKE, B. In *Beverley's Case* (j), Lord Coke says, that a lunatic may commit high treason if he kills or offers to kill the King.] A lunatic is liable civilly for a trespass; he is also liable as an inn-keeper, for the loss of his guest's goods: *Cross v. Andrews* (k). Whether or no he can state an account, seems undecided: *Tarbut v. Bispham* (l). In *Selby v. Jackson* (m), the Court refused to set aside

(a) 8 A. &amp; E. 754.

(b) 8 C. &amp; P. 679.

(c) 13 M. &amp; W. 623.

(d) 3 C. &amp; P. 1.

(e) 5 B. &amp; C. 170.

(f) 5 Beav. 325.

(g) 3 C. &amp; P. 30.

(h) 8 C. &amp; P. 679.

(i) Cited in Smith on Contracts, 230.

(j) 4 Rep. 123 a.

(k) Cro. Eliz. 622.

(l) 2 M. &amp; W. 2.

(m) 6 Beav. 192.

deeds executed by a lunatic while under restraint in an asylum. The Master of the Rolls, in delivering judgment, says: "In this case it is very remarkable, that there is no allegation of fraud against the defendants, no pretence that coercion was used, or any stratagem, or any contrivance, employed to compel or induce the plaintiff to do an act in any way tending to the personal benefit of the defendants." This case falls within the rule laid down in *Niell v. Morley* (a), viz, that a court of equity will not interfere to set aside the contract of a lunatic, if fair and without notice, especially where the parties cannot be reinstated. The question is not, whether the payment of the premiums could have been enforced against the lunatic in his lifetime, but whether the purchase money can now be recovered back. In many respects the case of a lunatic is assimilated to that of an infant: and the observations of Lord Mansfield, in *Zouch v. Parsons* (b), are applicable to both, viz., that "the privilege is a shield, and not a sword." This is like the attempt to recover premiums paid on an insurance without interest; in which case it has been held, that the premiums cannot be recovered after the risk has been run: *Lowry v. Bourdieu* (c). So also with respect to premiums paid on a policy void under the 19 Geo. 3, c.37: *Andree v. Fletcher* (d); or any illegal assurance: *Lubbock v. Potts* (e); *Morck v. Abel* (f).

*Needham*, in reply. The case of *Baxter v. The Earl of Portsmouth* did not establish the rule, but the exception. The maxim of the Roman law, "furiosus nullum negotium gerere potest, quia non intelligit quod agit" (g), has been adopted by all text writers in every civilized community. Upon what principle is it that a lunatic cannot suffer a recovery, and that his bond is void, unless it be that he cannot make a contract? In *Thompson v. Leach* (h), the Court say, "The grants of infants and persons non compos are parallel, both in law and reason." A lunatic, not having the power of consenting, is incapable of making a contract.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action for money had and received, brought to recover from the defendant (as secretary to an Assurance and Annuity Society) two sums paid by the intestate Thomas Lee, in his life-time, as the price or consideration for two annuities granted by the society, determinable with his life. At the trial, the money was claimed on two grounds: first, that the grantee was not of sound mind at the time the contract was made, and was therefore incapable of contracting, and, there being no contract, or a void contract, the money was recoverable; secondly, that there was no memorial of the

(a) 9 Ves. jun. 478. (b) 1 W. Bl. 575. (c) 2 Dougl. 468.  
 (d) 3 T. R. 266. (e) 7 East, 449. (f) 3 Bos. & P. 35.  
 (g) Inst., lib. 3, tit. 20, s. 8. (h) 3 Mod. 310.  
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annuities enrolled, and therefore they were void, and the money could be recovered back. Both the points were reserved at the trial; and subsequently, on a motion for a new trial, a special verdict was entered by agreement, setting forth the facts of the case, and raising the two points above stated.

The special verdict was argued before us on the 17th and 21st of January last, when the Court expressed a very clear opinion, that the second ground, of want of enrolment of a memorial, could not be supported, on the authority of the case of *Davis v. Bryan (a)*, (and of other cases), where the point was expressly decided: but as to the other ground, the Court took time to consider; and upon deliberation we are all of opinion, that, upon the finding of the jury, that the "purchasing the said annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities were fair transactions, and of good faith, on the part of the company, without any knowledge or notice on the part of the company of the unsoundness of mind," the action is not sustainable; and our judgment must be for the defendant.

As to the rule of the common law, the older authorities differ. According to the opinion of Littleton, s. 405, and Lord Coke, 1 Inst. 247, b., and *Beverley's Case (b)*, (disagreeing with Fitzherbert's "*Natura Brevium*," 202), no man could be allowed to stultify himself, and avoid his acts, on the ground of his being non compos mentis; but certainly the law did not allow the party himself to set aside, by any plea of insanity, acts of a public and notorious character, such as acts done in a court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed, unless a party appeared to be of sound mind.

The purchase also by a lunatic was valid, and vested the estate, and though his heirs might disagree to it, he could not (c).

But the rule, as above laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind, (as also intoxication), would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. The cases of *Dane v. Viscountess Kirkwall (d)*, and *Gore v. Gibson (e)* were cited to prove this, and their authority fully supports the doctrine contended for. The plaintiff's counsel distinguished the cases of *Browne v. Joddrell (f)*, and *Baxter v. The Earl of Portsmouth (g)*, and other cases of that sort, on the ground that necessities furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the Lord Chief Baron, in the case of *Gore v. Gibson*

(a) 6 B. & C. 651.

(b) 4 Rep. 123 a.

(c) Co. Litt. 2.

(d) 8 C. & P. 679.

(e) 13 M. & W. 623.

(f) 1 Moo. & M. 105.

(g) 2 C. & P. 178; 5 B. & C. 170.

as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided that an executed contract, if perfectly fair and bona fide, could be questioned on the ground of the unsoundness of mind of one of the parties; and he cited the cases of *Howard v. The Earl of Digby* (a), *Williams v. Wentworth* (b), and *Selby v. Jackson* (c), to show that the House of Lords in the first case, and Lord Langdale in the two last, had recognized the liability of lunatics or their estate, in respect of contracts bona fide acted upon. The case of *Niell v. Morley* (d), before Sir William Grant, to the same effect, had been cited before by the counsel for the plaintiff.

As far as we are aware, this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, bona fide, reasonable, and without notice on the part of those who have dealt with the lunatic.

On looking into the cases at law, we find that, in *Browne v. Joddrell*, Lord Tenterden says:—"I think the defence of unsoundness of mind will not avail, unless it be shown that the plaintiff imposed on the defendant."

In *Baxter v. The Earl of Portsmouth* (e), the Nisi Prius report of which is in 2 C. and P., 178, Abbott, C. J., with the concurrence of the rest of the Court, laid down the same doctrine.

In *Dane v. Viscountess Kirkwall*, Mr. Justice Patteson, in directing the jury, said, "It is not sufficient that Lady Kirkwall was of unsound mind; but you must be satisfied that the plaintiff knew it and took advantage of it." This is the result of all the modern authorities, and it is unopposed by any conflicting authorities; and it is in reality a safe and sound conclusion to which the old doctrine at common law, when properly understood, would conduct us with reference to this case.

We are not disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude that when a person, apparently of sound

(a) 2 Cl. & Fin. 634.  
(e) 5 B. & C. 170.

(b) 5 Beav. 325.

(c) 6 Beav. 192.

(d) 9 Ves. 478.

mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bona fide, and which is executed in good faith, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored, and the parties put in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased. On these grounds, we think our judgment ought to be for the defendant.

*Judgment for the defendant.*

THE plaintiff having brought a writ of error on the judgment of the Court of Exchequer in this case (a), it was argued (b) in last Hilary Vacation (February 5 and 7), by

*Needham* for the plaintiffs, and *Gurney* for the defendants. The arguments were substantially the same as those urged in the Court below. The following additional authorities were cited: *Plowd. Com.* 5 a, 6 a; *Com. Dig.*, tit. "Agreement," (A.1); *Bac. Abr.*, tit. "Agreement," (A); *Bracton*, lib. 5, c. 20, ss. 1 & 2; *Hall v. Warren* (c), *Pitt v. Smith* (d), *Stock on Lunacy*, p. 38; *Ex parte Clarke* (e), *Capper v. Dando* (f), *Sander v. Sander* (g), *Turner v. Myers* (h), *Browning v. Reane* (i), *The Countess of Portsmouth v. The Earl of Portsmouth* (j), *Groom v. Thomas* (k), *Woods v. Reed* (l), *Biffin v. Yorke* (m), *Stephens v. De Medina* (n), and *Weaver v. Ward* (o).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

PATTESON, J. This was an action for money had and received by the administratrix of the grantee of two annuities against the secretary of a Company who had granted them, to recover back the consideration money.

The first ground was, that no memorial of the annuity had been enrolled. The case of *Davis v. Bryan* (p) decided, that it was the duty of the grantee to procure the memorial, and that he cannot take advantage of his own neglect to treat the grant as void. The same doctrine was held in *Couper v. Godmond* (q), and in *Churchill v. Bertrand* (r), though the points there determined were not precisely the same. We are asked, sitting in a Court of error, to review those cases, but we are of opinion that the doctrine laid down in them is perfectly correct, and that this ground of error entirely fails.

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| (a) 2 Exch. 487.            | (b) Before Patteson, J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., and Williams, J. |
| (c) 9 Ves. jun. 605.        | (d) 3 Camp. 33.   |
| (f) 2 A. & E. 458.          | (g) 2 Coll. 276.  |
| (j) 1 Hagg. Eccl. Rep. 355. | (k) 2 Id. 436.  |
| (m) 6 Scott N. R. 233.      | (n) 4 Q. C. 422.  |
| (p) 6 B. & C. 651.          | (q) 9 Bing. 748.  |
|                             | (e) 2 Rus. 575.   |
|                             | (h) 1 Hagg. Consist. Rep. 414.  |
|                             | (i) 2 Ph. 69.   |
|                             | (l) 2 M. & W. 784.  |
|                             | (o) Hob. 134.   |
|                             | (r) 3 Q. B. 568.  |

The second ground was, that the contracts for the annuities were void, by reason of the grantee not being of sound mind and incapable to contract. The special verdict finds, "that at the time of the granting of the annuities, and payment of the consideration money, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the Society had not at that time any knowledge. That the purchasing of the annuities was in the ordinary course of business; that they were fair and bona fide transactions; and that the grantee appeared to the Society to be of sound mind, though he was then in fact of unsound mind." This does not show such a state of mind in the grantee as to render him necessarily incapable of knowing the nature of his act, and it negatives all knowledge by the Society of his state of mind, and any suspicion whatever of fraud or unfairness of any kind.

The question, therefore, is broadly raised, whether the mere fact of unsoundness of mind, which was not apparent, is sufficient to vacate a fair contract executed by the grantee, by payment of the consideration money, and intended bona fide to be executed by the grantor, by payment of the annuity. The old doctrine was, that a man could not set up his own lunacy, though such as that he did not know what he was about in contracting, and the same doctrine was applied to drunkenness. It is true that there are some exceptions in the old authorities, and the doctrine is not laid down uniformly with perfect distinctness; but, in general, it was as above stated. Modern cases have qualified it, and enabled a man, or his representatives, to show that he was so lunatic, or drunk, as not to know what he was about when he made a promise, or sealed an instrument. This special verdict hardly shows any such state of mind; but, even if it did, the modern cases show, that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position. The cases which are apparently the strongest for the defendant are those of contracts of marriage, decided in the Ecclesiastical Courts. But all those cases are such that the other contracting party must have known, or have had the greatest reason to believe, that the unsound state of mind existed, although they do not appear to have been decided on that precise ground.

The authorities on the subject were cited at the bar, and in the judgment of the Court below, so fully, that it is not necessary for us to go through them. We are of opinion that they fully establish the limited doctrine above mentioned; and that according to the facts stated in this special verdict, the contract in question was not void at

law, so as to enable the representatives of the grantee to maintain this action for money had and received.

*Judgment affirmed.*

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MATTHEWS v. BAXTER.

IN THE EXCHEQUER, JANUARY 27, 1873.

[Reported in Law Reports, 8 Exchequer, 132.]

DECLARATION for breach of contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction.

Plea, that at the time of making the alleged contract, the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew.

Replication, that after the defendant became sober, and able to transact business, he ratified and confirmed the contract.

Demurrer and joinder.

*Manisty, Q. C. (Hills, with him)*, in support of the demurrer. The contract of a man, who was totally drunk and incapable at the time, is not voidable merely, but void: *Gore v. Gibson (a)*. It cannot therefore be ratified. *Molton v. Camroux (b)*, which may be relied on by the plaintiff, only proves that where a lunatic's or drunkard's contract is executed, and the parties to it cannot be replaced in statu quo, such a contract cannot afterwards be set aside. In the present case the contract is executory, and the parties to it can be replaced in their original position.

*Morgan Lloyd, contra.* The case of *Molton v. Camroux (b)*, shows that a drunken man's contract is only voidable. *Gore v. Gibson (a)* is no authority to the contrary, for although in that case such a contract is spoken of as "void altogether," that expression must be taken with regard to the facts then under consideration. There was no suggestion there of any ratification, and the defendant was entitled to succeed upon proof that his contract was voidable, and that he afterwards voided it. Suppose the defendant wished to enforce the contract. The plaintiff could not refuse to perform it. And if the defendant could have enforced performance, he certainly had power to confirm it.

KELLY, C. B. I am of opinion that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant, is absolutely void. But it is difficult to understand this contention. For, surely the defendant,

(a) 13 M. & W. 623. (b) 2 Ex. 487; 4 Ex. 17; 18 L. J. (Ex.) 68, 356; *ante*, p. 553.



upon coming to his senses, might have said to the plaintiff, "True, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it." And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it.

MARTIN, B. I am of the same opinion. The judges in *Gore v. Gibson* (a) used the word "void," it is true, but I cannot think they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification. The case is an authority that this plea is good, but no authority for holding the replication bad. I think that a drunken man when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it.

PIGOTT, B. I agree with the rest of the Court, although with some hesitation. The language of the judges in *Gore v. Gibson* (a) must be taken with regard to the subject then under consideration; and the word "void" must be taken to mean no more than that the contract could not be enforced in invitum against the defendant. Upon the whole, I think the contract was voidable only and therefore capable of ratification.

POLLOCK, B. I am of the same opinion. The case of *Gore v. Gibson* (a) was no doubt rightly decided, but some of the dicta of the judges cannot be supported in all their fulness since the decision in *Molton v. Camroux* (b). I think the contract of a drunken man is voidable and not void.

*Judgment for the plaintiff.*

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### SECTION III.—MARRIED WOMEN.\*

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MARY SANKY <i>alias</i> WALGRAVE	.	.	.	PLAINTANT.
GOLDING	.	.	.	DEFENDANT.

IN CHANCERY, ANNO 21 AND 22 ELIZ.

[Reported in *Cary's Reports*, 124.]

THE plaintiff setteth forth in her bill, that she joined with her husband in sale of part of her inheritance, and after, some discord

(a) 13 M. & W. 623. (b) 2 Ex. 487; 4 Ex. 17; 18 L. J. Ex. 60, 356; *ante*, p. 553.

\* Ch. IV, Sect. IV, Finch.

growing between them, they separate themselves; and one hundred pounds of the money received upon sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of Nicholas Mine, Esquire, and bonds then given for the payment thereof unto Henry Golding, deceased, to the use of the plaintiff; which bonds are come to the defendant, as administrator to the said Henry Golding, deceased, who refuseth to deliver the same to the plaintiff, and hereupon she prayeth relief; the defendant doth demur in law, because the plaintiff sueth without her husband; and it is ordered the defendant shall answer directly.

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PYBUS v. SMITH.

IN CHANCERY, AUGUST 3, 1791.

[*Reported in 3 Brown's Chancery Cases, 340.*]

By lease and release, dated 5th and 6th May 1785, being a settlement subsequent to the marriage of the defendant Thomas Vernon with Anna Maria his wife, the said Thomas and Anna Maria, in pursuance of a decree in the Court of Chancery, released to the defendants Smith and Leader a messuage in Garland Alley, Bishopsgate Street, in trust to permit said Anna Maria, to receive, or otherwise during the life of said Anna Maria, to pay, apply, and dispose of the rents and profits unto such person or persons, in such shares and proportions, manner, and form, and to and for such uses and purposes, as she, the said Anna Maria Vernon should, by any writing or writings under her proper hand, from time to time, direct or appoint; and in default of such direction, then into the proper hands of the said Anna Maria, and for her sole and separate use; and after the decease of the said Anna Maria, then upon trust for such person, for such estate and estates, in such shares and proportions, and for such uses, and chargeable with such sums, and subject to such powers, provisions, declarations, limitations, and agreements, and in such manner and form, as the said Anna Maria Vernon, whether covert or sole, by any deed or instrument in writing, with or without power of revocation, to be by her only executed, under her hand and seal, in the presence of two or more credible witnesses, should direct, limit, or appoint; and in default thereof, and as to such part whereof there should be no appointment, in trust for the said Anna Maria Vernon, her heirs and assigns forever. And it was by the said indenture witnessed, that the said trustees should stand possessed of 2,531*l.* four per cent. Bank annuities, mentioned in the said decree, during the life of the said Anna Maria Vernon, to pay and apply the dividends unto such persons, and in such shares

and proportions, manner and form, and to and for such uses, intents, and purposes, as the said Anna Maria Vernon should, by any writing or writings under her hand, direct and appoint; and in default thereof, to pay the same into the hands of the said Anna Maria Vernon, for her sole and separate use; and after the decease of the said Anna Maria Vernon, to sell the same, and pay and apply the money arising therefrom to and amongst all and every the child and children of the said Anna Maria by the said Thomas; and in case there should be no child, or all of them should die under twenty-one, unmarried, then to such uses as said Anna Maria Vernon should by any deed or instrument in writing, under her hand and seal, executed in the presence of, and attested by two or more credible witnesses, direct or appoint; and in default thereof, for the executors and administrators of said Anna Maria Vernon.

The defendant Thomas Vernon was a trader, and dealt with the plaintiffs, who were bankers, in the way of their trade, and applied to them to accept and pay such drafts as he should draw upon them, or make payable at their house, which they consented to; but in 1785, being considerably in advance on his account, they required him to give them security, which he proposed to do upon this separate property of the wife's; and by indenture, dated 15th August, 1785, made between the said defendant Thomas Vernon of the first part, the defendant Anna Maria Vernon of the second part, and the plaintiffs of the third part reciting the settlement of the 5th May preceding, it was witnessed, and Thomas Vernon thereby covenanted to supply plaintiffs, their executors and administrators, with cash sufficient to pay and discharge all drafts or bills drawn or made payable by him at their banking-house, or which should become due or payable; the defendant Anna Maria Vernon did, by virtue and in pursuance of her power, direct and appoint that the rents and profits then due, or to become due, in respect of the premisses, should, during her life, be paid by the trustees to the plaintiffs; and from and after her decease the trustees should stand seised thereof to the use of plaintiffs; and she also directed and appointed, that the interest and dividends then due, or to become due, of all the 2,531*l.* four per cents. should be paid by the trustees to plaintiffs, and immediately after her decease without issue, should belong to, and the trustees should be possessed thereof, for the use of the plaintiffs, upon trust, in case default should be made by the said Thomas Vernon in payment to plaintiffs, their executors or administrators, of any of the sum or sums of money so to be advanced by them to said Thomas Vernon; that it should be lawful to plaintiffs, &c. to sell the reversion in the real estate, and the contingent interest in the money in the funds, or to raise and take up by mortgage thereof so much money as, with the rents and dividends,

should be necessary for paying the costs they should be put to, and for reimbursing them all sums in which the said Thomas Vernon should be indebted to them on account of money so advanced, and interest thereon; and if there should be any surplus, to pay the same to her; and the deed contained a power of attorney from the trustees to plaintiffs to receive the rents and dividends, and a covenant from plaintiffs, in case they were kept indemnified, to re-convey.

By deed-poll, dated 16th August, 1785, under the hand and seal of Anna Maria Vernon, she, in consideration of the marriage, and of love and affection, and by virtue of her power, directed the trustees to pay the rents and, after her decease, to stand seised of the real estate to the use of her husband, in fee; and also to pay to him the dividends of the money in the funds; and after her decease, without issue, to stand possessed of the principal in trust for him absolutely.

In November, 1786, the plaintiffs having discovered this deed-poll, and having observed that though the deed of appointment extended to an indemnity against money paid upon drafts, or bills drawn upon, or made payable at their house, by defendant Vernon, that it did not extend to money paid for discount of bills or promissory notes for the accommodation of the defendant Thomas, applied to him for a further security against such moneys advanced by way of discount, and by indentures of lease and release, dated 6th and 7th December, 1786, the estate and moneys in the funds were made a security for sums so advanced, or to be advanced.

The plaintiffs afterwards discounted several notes and bills of exchange for defendant Thomas, and were 1,500*l.* in advance on his account, when, in 1788, a commission of bankruptcy was issued against him; upon which they applied to the trustees to pay the rents and dividends to them, and to join them in the sale of the reversionary and contingent interest of defendant Anna Maria in the real estate, and money in the funds, in order to their indemnification; and, upon their refusal, filed the present bill, the prayer of which was, that the defendant should pay such rents and dividends, and join in such sale.

Mrs. Vernon, in her answer, submitted that the rents and profits of the real estate, and the dividends upon the money in the funds, ought to be paid into her own hands, for her separate use, and that they were not liable to the debts or engagements of her husband; and said, that she did not conceive, at the time of executing the deed, that she was conveying her life estate and interest, but only the reversion in case of her death without issue; and therefore hoped that the trustees would be decreed to pay the same to her.

The cause came on to be heard in Trinity Term, 1790, when it was referred to the Master to report under what circumstances the deed was executed; and the Master was to examine the parties on interrogatories.

The Master reported, that, upon examination of witnesses examined before him on interrogatories, it appeared that the deeds were executed by the defendants Thomas and Anna Maria Vernon freely and readily, and that no arguments or persuasions were used, at the time of executing the said deeds by any person, to induce them to execute the same; but that the witnesses did not recollect that the deeds were read, or the purport thereof explained to the defendant Anna Maria; but one of the witnesses, (who prepared the deed) said, that it was his constant practice to read, or explain, to all parties executing deeds prepared by him, and particularly to married women, the nature and contents of such deeds; and therefore he was induced to believe that the deeds so executed were read, or the purport thereof explained to the defendants, and understood by them, previous to the execution of them: and that the plaintiffs, upon their examination, stated that the security was executed upon the proposal of Thomas Vernon, that they had no concern in the preparation, and that they did not know of the preparation thereof until after the execution; but they believed the defendant Anna Maria knew that she subjected not only the contingent reversion of her property, but also the income during her life, to the payment of the money which was, or should become due, from her husband to the plaintiffs; and that no attempt was made, or endeavor used to make her believe that she was only charging her reversionary interest with the same, and said that they did not advance any money to the defendant Anna Maria for joining in the deeds.

The cause came on now upon the Master's report;—Mr. *Solicitor General*, for the plaintiffs, stated the facts, and argued that a feme covert was, as to her separate property, exactly in the same state as a feme sole; and that the payments, in this case, being to be made to her from time to time, could make no difference.

Mr. *Lloyd* and Mr. *Nedham* for the defendants, said the present case involved two questions; 1st. Whether the Court will give its assistance to carry the voluntary agreement into execution, even where the woman has received the money, and the transaction is perfectly fair. 2nd. Whether this is a case in which the Court will lend such assistance. It is certainly in the power of a parent to give a daughter, who is married, a provision which shall be payable from month to month, or at other periods, without giving her a power to assign it over at once. Here the legal estate is in the trustees, to receive the rents and interests, and to pay them to Mrs. Vernon, or to permit her to receive them, which is the same thing; for though to permit a man to receive rents and profits would, at law, be a good use, here the use would be executed in the trustees. The title of the plaintiffs is equitable and voluntary, and with full notice that she was a married woman; and the bill states, that, previous to the transaction, the plaintiffs had trusted Vernon as far as they dared.

Mrs. Vernon was an infant, and a ward of this Court, when Vernon carried her off to Scotland. It was agreed between him and her friends, that he should have part of her fortune, upon settling the rest upon her and her children. Upon this, he made a proposal, by which, had it been carried into execution, she could not have appointed it in this way. When your Lordship referred it to the Master he disapproved it, and the present settlement was afterwards made. There are many cases where the husband's proposal has been considered as the agreement. In such a case, your Lordship will never permit the trustees to be converted from trustees for her to trustees for the plaintiffs.

The trusts are, that they shall permit and suffer her to take the rents from time to time; the proposals were, that they should pay them into her own hands; she was a married woman, and the Court intended it should be a provision from quarter to quarter, as the rents and interests were paid. It was intended as a maintenance, but the Court could not intend that she should, by one stroke, put an end to her future subsistence, but only that she should appoint the dividends as they became due.

If this is not so, it would be of no use to put in trustees into these settlements. Here the defendant has disposed of her provision without their intervention, and swears that she was not informed the conveyance extended further than her reversionary interest.

In *Allen v. Papworth*, 1 Vesey, 163, where it was held the wife might appoint her separate property for her husband's debts, she had the whole property, it was not intended as a maintenance. The inference from *Grigby v. Cox*, S. B. 518, is, that if the words there had been, as they are in this, "to pay from time to time," the wife could not have conveyed it away (a). In *Machorro v. Stonehouse*, cited in *Hulme v. Tenant* (b), the purchaser's bill was dismissed; that case is well worth considering, for Sir Thomas Sewell was in great business at the time the cases on the subject were determined, and must have known what was done.

In this case, the agreement being different from the first proposal, the children would be entitled to have the settlement varied.

As to the propriety of carrying the agreement into execution, it is merely an equitable agreement, and the plaintiffs are applying to change the terms of it. If the agreement is an improper one the Court will not carry it into execution; it was executed either in great distress, or under the control of her husband, and the deeds were prepared from the instructions of the husband alone; by her answer it does not appear she knew what was done; the plaintiffs knew she was to receive no compensation for it.

If the wife conveys her separate property to the husband himself,

(a) *Hyde v. Price*, 3 Vesey, 437.

(b) 1 Bro. C. C. 18; 1 L. C. Eq. 481.

without doubt that will not avail; yet there is no positive law that such a conveyance shall be set aside.

If they were failing in their circumstances, that would be a sufficient ground to set the transaction aside.

LORD CHANCELLOR said, if the point was open, he should have thought that a feme covert who had a separate estate should not part with it without an examination; but a feme covert had been considered by the Court, with respect to her separate property, as a feme sole; therefore, though he had been desirous of going as far as he could, he found he had gone too far upon a former occasion. If a feme covert sees what she is about the Court allows of her alienation of her separate property.

If it was the intention of a parent to give a provision to a child in such a way that she cannot alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms.

It was referred to the Master to inquire whether the plaintiffs had any other security (a).

(a) "When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority, not now to be questioned, but which could only have been founded upon the power of this Court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases.

If any rule, therefore, were now to be adopted, by which the separate estate should, in any cases be divested of the protection of the clause against anticipation, it would in such cases, defeat the object of the power so assumed.

A feme covert, with separate estate, not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this Court, with the assistance of her trustees, can effectually protect her: in the other, her sole dependence must be upon her husband not exercising that influence or control, which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this Court should subject her to it, and by so doing defeat his purpose and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." Per Lord Cottenham in *Tullett v. Armstrong*, 4 Mylne & Craig, 393. ED.

## ROBERTS v. WATKINS AND HOWELLS.

IN THE HIGH COURT OF JUSTICE, MAY 12, 1877.

[Reported in 46 Law Journal Reports, Q. B. 552.]

THIS was an action on a joint and several promissory note due on January 12, 1876, and made on January 12, 1874, by the two defendants, and one Rhys Howells, since deceased, who was the husband of the defendant Margaret Howells.

It was proved at the trial that Margaret Howells had property settled upon her without power of anticipation, and that she was discovert at the time of action brought; she had never in any way acknowledged or ratified the contract since her husband's death. Judgment was given at the trial for the plaintiff against Watkins, and the learned Judge reserved the question as to the liability of Margaret Howells for further consideration.

*B. T. Williams* and *E. J. Dunn* (on April 25) moved to enter judgment for the plaintiff. *Hulme v. Tenant* (a) and *Murray v. Barlee* (b) are authorities that if this defendant had a separate estate at the time, then she has charged it by signing this note. It must be admitted that we cannot touch the real estate which she possesses under the will, because there has been no deed, but we have a right against the rents.

*McIntyre* and *W. D. Benson* contra. If at the time of the contract she had no power to charge, then the note is void—*Jackson v. Hobhouse* (c) and *Fitzgibbon v. Blake* (d). She could not be bound unless it is presumed that she intended to bind the estate, and Equity would not presume that, when the evidence is to the contrary.

*Cur. adv. vult.*

The following judgment was (on May 12) delivered by—

LUSH, J. This action is brought upon a joint and several promissory note made by the defendant Watkins, the defendant Margaret Howells, then the wife of Rhys Howells, and by her husband, for the payment to the plaintiff on the 12th of January, 1876, of 150*l.*, with interest at five per cent.

Rhys Howells died before the commencement of the action. Margaret Howells pleaded her coverture at the date of the note, and in answer to the suggestion that she had property settled to her separate use, denied that she had any such property, but that if she had it was settled on and vested in her for her separate use without the power of anticipation or alienation. It was proved at the trial that she had property so settled without power of anticipation, and the

(a) 1 Wh. & Tu. L. Ca. in Eq. 481.

(c) 2 Mer. 488.

(b) 3 Myl. & K. 220.

(d) 3 Ir. Ch. Rep. 328.



question was then raised whether, being discovert at the time of action brought, she was liable in respect of that property, and if she was, whether the property could be reached by any process or proceeding in this action.

There was no evidence that she had in any way acknowledged or ratified the contract since her husband's death.

There being no facts in dispute no verdict was taken. I reserved for further consideration my judgment, and the question has since been argued before me upon motion for judgment.

At Common Law the contract of a feme covert was void, so that it could not be enforced against her in her husband's lifetime or after his death. Equity abating the rigor of the Common Law which vested all her property in her husband permitted her to hold as a feme sole property settled to her separate use, with all its privileges and incidents, including the *jus disponendi*—*Fettiplace v. Gorges* (a), and the power of contracting debts chargeable upon the property which she so held; and it has long been settled that the giving of a promissory note by a married woman without any mention of her separate estate is sufficient to make her separate estate liable.

But it was found necessary, in order to give more complete protection from the influence of her husband, to allow of such a modification of the separate estate as should deprive her of the *jus disponendi* and of charging her income with debts during the husband's lifetime. It has accordingly been established that where a gift is made to a married woman for her sole and separate use without power of anticipation she is disabled from charging it with debts. Equity, which creates the separate estate for her benefit, carries out the declared purpose of the gift, and holds that where such a restriction is imposed she shall have no dominion over the income till the payments actually become due—*Pybus v. Smith* (b). It follows that the promissory note was *nudum pactum* when it was made as well in Equity as at Common Law. To hold it binding now that she has become discovert would be to allow her to anticipate her income and thus entirely to overthrow the whole protection which is given to married women by Courts of Equity—*Re Sykes' Trusts* (c). My judgment is therefore for this defendant.

I may add that as there are no trustees, if there had not been the restriction adverted to I should have held that the separate estate might have been reached by process in this action.

But though entitled to judgment the defendant is not, in my opinion, entitled to any costs. Had her statement of defence candidly stated the fact that she had separate property and set out the devise under which she acquired it, and so enabled the plaintiff to trace out

(a) 1 Ves. jun. 48. (b) 3 Bro. C. C. 339; *ante*, p. 568. (c) 2 Jo. & H. 419.

the will, I should have awarded her at least some portion of costs, but she adopted a style of pleading which I cannot but strongly disapprove of and has thereby put the plaintiff to the needless expense of administering interrogatories in order to extract the truth, which ought to have been stated in her answer.

On this account, and considering that she defended jointly with her mother, against whom the verdict stands, and that she had no witnesses, I direct judgment to be entered for her without costs.

*Judgment accordingly.*

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BUTLER v. BUTLER.

IN THE HIGH COURT OF JUSTICE, FEBRUARY 28, 1885.

[*Reported in Law Reports, 14 Queen's Bench Division, 831.*]

ACTION by husband against his wife to recover 1848*l.* out of her separate estate, for money paid on her behalf.

Defence (amongst others), that in the circumstances the defendant was not legally liable. Joinder of issue.

Feb. 26. The case was tried before Wills, J., and a common jury, at the Royal Courts of Justice, when it appeared that the defendant before her marriage carried on business as a provision dealer, and on the 23rd of January, 1883, the plaintiff, at her request, paid 70*l.* 18*s.* for provisions supplied to her and 34*l.* 12*s.* for repairs to the house where she carried on business. On the 7th of April, 1883, the plaintiff and the defendant were married, and afterwards lived together, but she continued to carry on business at her former place of business. The plaintiff made other payments for the defendant at her request after the marriage in respect of moneys due from her before the marriage. In some cases the request had been before, and in others it was after the marriage. With regard to the residue of the amount claimed, it was paid or advanced by the plaintiff after the marriage. Part was paid to the wife at her request, to be spent upon building speculations of her own (after the marriage), and the residue was paid to different creditors of the wife at her request, and upon her promise to repay the money out of her separate estate.

On the 2nd of August, 1883, the defendant signed an instrument in writing charging her separate estate with part of these advances, and she also rendered an account, giving her husband credit for 1300*l.*

It was agreed that the question whether, upon these facts, the defendant was legally liable, should be first considered.

*Kemp*, Q.C., and *Henry Kisch*, for the plaintiff. The plaintiff's

claims are of three kinds. First, in respect of payment before marriage for the wife's debts contracted before marriage; second, in respect of payments after marriage in respect of debts contracted before marriage; and third, in respect of payments after marriage in respect of debts contracted by her after marriage. With regard to all three classes the effect of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 2, 3, 4, ss. 12 and 13, is to charge a married woman's separate estate not only as regards contracts with third parties, but also as between her and her husband. By s. 1, sub-s. 2, a married woman may make herself liable in respect of her separate property on "any" contract, and to be sued in contract "in all respects as if she were a feme sole," and her husband need not be joined with her as plaintiff or defendant. The effect of this sub-section is to destroy the Common Law doctrine of conjugal unity, which was all that prevented the husband from suing his wife in a court of law (a).

(a) "The common law of this country, as to the disabilities of married women, was not (as I conceive) founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control; nor was it subject to exception whenever there might be circumstances sufficient to repel such a presumption. The principle of the disability of coverture was that stated by Littleton (sect. 168): "A man and his wife are but one person in the law," which is the reason why "a man cannot grant or give his tenements to his wife during the coverture"; and (as Lord Coke says, in his comment on the same place) "she is disabled to contract with any without the consent of her husband; omnia quæ sunt uxoris sunt ipsius viri." As to her personal property in possession the husband had absolute power without any concurrence on her part, and also as to the administration and usufruct of her real estate. By personal contracts either with him, or with any other person, she could in no way bind herself. Equity, in later times, through the medium of trusts, enabled her to acquire separate estate, and to deal with such separate estate as if she had been a feme sole, except when restrained from anticipation by the terms of the trust; in which case she continued under disability as to the corpus and future income of such property, though the *jus mariti* was excluded; and by a statute recently passed this doctrine of separate estate has been very largely extended.

Although a married woman could not contract or convey property (not separate) except so far as by common or statute law she was enabled to join with her husband in doing so, she might always, when her interest required it, sue and be sued, jointly with her husband, or (in equity) apart from her husband by a next friend. In respect of all interests which she had in the subject-matter of any such suit, she was bound as much as if she had been under no disability, by the powers of the Courts, and by the rules and principles of law and equity administered by them. Real estate of which she or her husband in her right might be in possession could be recovered against her as well as against her husband. Her conscience, as well as that of her husband, might be affected by personal frauds, so as to enable the Courts to adjudge what otherwise would have been hers to the defrauded party. If property were given to her on an express or implied condition, she might accept and sue for it, but she could not, any more than a person under no disability, at once accept the gift and reject the condition. Unless she had been held under such circumstances to be capable of election the gift must necessarily have failed; which Courts of Equity thought neither necessary nor reasonable. It was, therefore, a just corollary from her right to sue, and her liability to be sued, in such a case, that she might elect, and be bound by her election, unless the nature of her interest in any property to be relinquished created some obstacle. Courts of Equity did not, in such cases, proceed upon the principle of ascribing to a married woman capacity to bind herself or her property (not separate) by contract, for this special purpose; she could not so bind any separate estate as to which she was at the time restrained from anticipation. The late Master of the Rolls, in *Smith v. Lucas*, 18 Ch. D. 531, also held that she could not, by any election, bind beforehand her after-acquired separate estate (though given to her without restraint on anticipation), which she certainly might have done if she had been supposed to have for that

Sub-sect. 3 makes any contract by a married woman, whether in writing or not, a contract with reference to her separate property. By s. 12 every married woman has against her husband the same civil remedies for the protection of her separate property as if she were a feme sole, and it must be taken that the husband's rights as against her are reciprocal. Sect. 13 enacts that a woman after marriage is to remain liable for debts contracted before marriage, and as between herself and her husband, "unless there be any contract between them to the contrary," her separate property is to be primarily liable. Sec. 14 makes the husband liable as before for such debts to the extent of property of the wife acquired by him upon the marriage, and the effect of the two sections must be to enable the husband to recover from the wife out of her separate estate money paid by him in discharge of ante-nuptial debts. *Bursill v. Tanner* (a) decides that since the Act judgment may be obtained against a married woman generally, though execution will be limited to her separate estate, which goes to show that the effect of the Act is to destroy the Common Law doctrine as to the unity of husband and wife. In *Mander v. Harris* (b), Cotton, L.J., assumes that the Act was intended to alter the rights of husband and wife inter se. In *In re Martin, Butterfield v. Mott* (c), Bacon, V. C., appears to recognize the right of a husband to sue his wife since the Act. Further, the action must be decided according to the rules of Equity, and it is well established that in Equity a wife may enter into a contract for a valuable consideration with her husband: *Hewison v. Negus* (d), per Romilly, M.R.; *Woodward v. Woodward* (e) is to the same effect.

[They cited with reference to the liability of the wife's estate for payments after marriage in respect of debts before and after marriage: *Vansittart v. Vansittart* (f); *Teasdale v. Braithwaite* (g); *In re Foster & Lister* (h); *Nicol v. Jones* (i), and with reference to the construction of the Act, Montague Lush on Husband and Wife, pp. 165, 395.]

*Rose-Innes*, for the defendant. First, the Act was intended, as were the previous Married Women's Property Acts, to protect the wife in the enjoyment of her separate property. It was never intended to give the husband fresh remedies against his wife which he did not possess before the Act. It was only intended to affect the wife's lia-

purpose the same capacity to contract which she would have had if a feme sole. In *Stanley v. Stanley* 7 Ch. D. 589, the Court of Chancery refused to hold a married woman estopped even by her own participation in a gross fraud, by which an innocent purchaser was led to believe that she was not restrained from anticipation, when she was, in fact, so restrained." Per Earl of Selborne, *Cahill v. Cahill*, 8 App. Cas. 425. ED.

(a) 13 Q. B. D. 691.

(d) 16 Beav. 598.

(g) 5 Ch. D. 630.

(b) 27 Ch. D. at p. 170.

(e) 3 De G. J. & S. 672.

(h) 6 Ch. D. 87.

(c) W. N. 1884, 164.

(f) 4 K. & J. 62.

(i) Law Rep. 3 Eq. 709.

bility with regard to strangers. *Cahill v. Cahill* (a) shows that the wife, as regards the power to contract with her husband, is not in the position of a feme sole.

*Cur. adv. vult.*

Feb. 28. WILLS, J., delivered judgment as follows. This is an action by a husband against his wife seeking to have it declared that, first, moneys lent by him to her before marriage, secondly, moneys lent by him to her after marriage are a charge upon her separate estate, and asking for the necessary inquiries in order to give effect to his claim.

The marriage took place on the 7th of April, 1883. The wife was carrying on a business of her own as a provision dealer. They lived away from the place of business, and she carried on the business after marriage apart from her husband. Before the marriage the plaintiff had, at the request of the defendant, paid sums of money for her to pay debts she owed in business. After marriage he paid other sums at her request, and he lent her other sums, as to some of which at all events there is evidence that she proposed to him to charge them upon her separate estate.

It is objected that no action will lie. The moneys advanced before marriage constituted, it is admitted, ante-nuptial debts. To them and to the loans and payments upon request made after marriage very different considerations apply. I will consider first the case of the loans and payments upon request made after marriage.

Now I take it to be clear that in the ordinary sense in which we understand a mere personal contract, neither at law nor in equity can there be any contract between husband and wife. I take it to be equally clear that this general rule is subject to the qualification that with respect to the wife's separate estate free from restraint upon anticipation she is competent to contract and to contract with her own husband: *Hewison v. Negus* (b); *Vansittart v. Vansittart* (c). It is difficult to see any difference in principle between cases in which mutual stipulations in post-nuptial settlements have been enforced on the ground of such capacity to contract, or in which such settlements have been upheld against creditors as not being voluntary, and a case like the present in which a contract of loan is sought to be upheld. *Woodward v. Woodward* (d) is a very distinct authority to this effect: "This Court," says Lord Westbury, "has established the independent personality of a feme covert with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision, whereby the old common law has been entirely abrogated and the power of the wife to contract with her husband has been

(a) 8 App. Cas. 420. (b) 16 Beav. 594, 598.

(c) 4 K. & J. 62, 70.

(d) 3 De G. J. & S. 672.

established. It is quite clear that if money, part of the income of her separate estate, be handed over by her to her husband, upon a contract of loan, the wife may sue her husband upon that contract (a).

If the capacity to contract exist, the power and the remedy must alike be mutual, and the husband must be able to sue the wife as well as the wife the husband, and indeed in many cases undistinguishable in principle from this the husband has sued in Courts of Equity. As to some of these claims the wife is alleged to have expressly charged or promised to charge her separate estate; as to others, she merely appears to have borrowed them or requested her husband to pay them under such circumstances (it is to be assumed for the purposes of my present decision) as but for the relation of husband and wife would have raised a legal obligation to repay the money advanced by the husband. But this distinction has, I think, no effect upon the rights of the parties, inasmuch as by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown."

As to the post-nuptial loans and advances by the husband therefore I think the plaintiff has a right of action.

To the ante-nuptial advances very different considerations apply. There is no doubt that prior to the Married Women's Property Act, 1882, no such action could have been maintained, but it is alleged that it will now lie under the provisions of that Act. It is necessary therefore carefully to examine its provisions bearing upon this question.

By s. 12 it is enacted that "Every woman whether married before or after this Act shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a feme sole." This enactment, however, is silent as to any correlative rights of the husband, and has no application to a claim by the husband upon the wife's separate estate. It is urged that the Act must have meant to give the husband correlative rights in respect of the separate property of the wife. I answer, I do not see why. I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its pro-

(a) *Ibid.* at p. 674.

visions do not apply. I pass therefore to s. 13, which deals with the wife's responsibility in respect of ante-nuptial liabilities whether arising out of contracts or tort. It is provided that "a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, . . . . and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof."

The words of the earlier part of the section are large enough to cover the present contention of the plaintiff, but it is very material to observe that they apply equally to torts as well as to contracts, yet is expressly provided by s. 12, that with the exception of the very special case to which s. 10 refers, no husband or wife shall be entitled to sue the other for a tort. If s. 13 had been intended to cover cases of claims by a husband as well as those by a stranger against the wife it would scarcely have failed to have some reference to the enactment immediately preceding that no husband should be able to sue a wife for a tort. The provision as the primary liability between husband and wife is apparently intended to apply to the whole of the area covered by the preceding parts of the section, and yet it is insensible as applied to the case of an action for claims of the husband against the wife's separate estate. A proviso follows which does not, I think, throw further light upon the question, and is only worth a passing notice as a curious specimen of drafting. In an Act repealing two other Acts, and professing in terms to consolidate and amend their provisions, they are referred to in such a manner that it would be impossible to understand the present enactment without an examination of the whole of the provisions repealed.

Sects. 14 and 15 contain important provisions concerning the husband's responsibility for his wife's ante-nuptial liabilities whether of contract or tort. They are of course applicable only to actions by strangers. They are obviously intended to be supplementary to the provisions of s. 13, and they confirm, in my opinion, the view that in no part of this group of sections was it intended to deal with ante-nuptial claims either of husband or wife against one another.

Sect. 17, which provides a summary remedy in case of certain classes of disputes as to property between husband and wife, has no application to or bearing upon the present question.

There remain only to be considered the provisions of s. 1, sub-s. 2, whereby it is enacted that a married woman shall be capable of suing and being sued either in contract or in tort or otherwise in all respects as if she were a feme sole. This provision, however, affects mode of procedure. The section dispenses in terms with the necessity of joining the husband as plaintiff or defendant, and I am of opinion that, except as to a contract made by a woman whilst under coverture, it was not intended to enlarge any rights or liabilities of either husband or wife apart from those which may necessarily flow from the fact that the husband need no longer be joined as a matter of procedure, which will have principally to do with liabilities to costs.

I am of opinion, therefore, that in respect of the ante-nuptial liabilities of wife to the husband the action cannot be maintained. Payments made by him after marriage upon requests antecedent to marriage are liabilities arising after marriage and fall under the first head of claim which I have discussed.

*Judgment accordingly (a).*

(a) In the case of *In re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169, where the trusts of a policy of insurance on the life of the husband were for the trustees to receive and invest the money and to pay the income to the wife and her assigns during her life in case she should survive her husband, and for her sole and separate use during her life in case she should marry again; and where the wife had joined in a deed which purported to assign all her interest in the trust property, Mr. Justice Pearson said: "At the present moment the wife has not any separate estate in the policy; she has only a contingent reversionary interest in it to her separate use. If she should survive her husband, she will have no separate estate in the proceeds of the policy unless and until she marries again. It is said that by virtue of sect. 1, sub-sect. 4, of the Married Women's Property Act, 1882, she can now enter into a binding contract to part with that future contingent separate estate; that, though at the present moment she has no separate property in the fund, her contract will bind that future separate interest in case it should hereafter arise. In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract, and which she has at the time when judgment is recovered against her, will be liable for the breach of contract. But the Act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property." *Ed.*



## CHAPTER VIII.

### SECTION I.—MISTAKE.\*

Mistake..... 583 Of one Party, not known to the other ..... 583 Of one Party, known to the other. 585 Of both Parties, in expressing the Agreement ..... 586	Of both Parties, in a Matter in- ducing the Agreement..... 589 Of both Parties, as to the Appli- cation of the Agreement..... 591 Mistake as Matter for Pleadings at Law upon equitable Grounds. 592
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IN contracts founded on agreement, whether simple contracts or contracts under seal, the agreement, apparently complete and sufficient to establish the contract, may be vitiated by causes influencing the agreement, which under certain conditions may render it void of legal effect. The causes which may thus qualify the legal effect of an apparently valid agreement are mistake, fraud, and duress.

**Mistake.**—Mistake is occasioned by the ignorance or misconception of some matter, by reason of which the agreement apparently made is not the agreement intended to be made, or is one which would not have been made but for the mistake; and the question arises as to the effect of such mistake upon the operation of the agreement in creating a contract.

**Mistake of one party not known to the other.**—The mistake may be that of one party only; or there may be a mistake of both parties respecting the same matter, and thus there arise two different conditions of the question, which are governed by considerations of a different character.

The mistake of one party only is attended with different consequences accordingly as the other party is, or is not, cognizant of the mistake.

The law judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them (*a*); consequently, an agreement cannot be affected by the mistake of either party in expressing his intention or in his motives, of which the other party has no knowledge, and the party who has entered into an agreement under such mistake is bound by the agreement actually made, and cannot assert his mistake in avoidance of the agreement.

The defendant sold to the plaintiff a hundred chests of tea out of a specific cargo, to be equal to a sample shown at the time of the sale, which the defendant then believed to be a sample of the cargo, but which was not in fact a sample of that cargo, but of a different tea; it was held that the defendant had not the right of avoiding the contract by giving notice to the plaintiff of the mistake respecting the sample; and in an action for not delivering the tea, a plea on equitable grounds to the effect that he had given notice of the mistake and

(*a*) See *anie*, p. 2.

\* Ch. I, Sect. I, § 1, Leake.

of his intention to treat the contract as void on account of the mistake, was held a bad plea (*a*).

At a sale by auction a lot was knocked down to the defendant at the price of eighty-eight guineas, and delivered to him immediately; shortly after receiving the articles, he stated that he supposed the bidding had been forty-eight guineas and refused to accept them; it was held that he might set up this mistake in order to show that his acceptance of the goods was not such an acceptance of the ownership as was required by the Statute of Frauds in order to charge him with the contract without a memorandum in writing (*b*). In this case, it will be observed, the question was whether parol evidence of the contract was admissible, and not whether a mistake of one party only could be asserted for the purpose of escaping from a contract made by him. If the contract could have been proved, the defendant, it is submitted, would have been held bound by the bidding which he had in fact made.

Upon this principle, in the case of a written agreement, it is not competent for either of the parties to avoid its effect by merely showing that he understood the terms in a different sense from that which they bear in their grammatical construction and legal effect (*c*).

**Mistake in motive of party.**—Where a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract. If a person purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less, on that account, bound to pay for it (*d*). A person executed a deed in the belief that another person would also execute it, but did not deliver it as an escrow conditional upon such execution, and was not betrayed into executing it by any fraud or misrepresentation; he was held bound by the deed, although the person expected by him to execute failed to do so (*e*). A person being desirous of becoming a freeholder of Essex contracted to purchase a house on the north side of the river Thames, which he supposed to be in that county, but which proved to be in Kent; the contract was held binding, and he was compelled in equity to complete the purchase (*f*).

**Specific performance refused on ground of mistake.**—A Court of Equity will in some cases refuse to grant a plaintiff the peculiar

(*a*) *Scott v. Littledale*, 8 E. & B. 815; 27 L. J. Q. B. 201.

(*b*) *Phillips v. Bistolli*, 2 B. & C. 511; *ante*, p. 67.

(*c*) See *Hotson v. Browne*, 9 C. B. N. S. 42; 30 L. J. C. P. 106.

(*d*) *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

(*e*) *Cumberlege v. Lawson*, 1 C. B. N. S. 709; 26 L. J. C. P. 120.

(*f*) *Shirley v. Davis*, cited 6 Ves. 678, 7 Ves. 270; but see 1 Bro. C. C. 440 (2).

remedy of specific performance of a contract which the defendant has entered into under a mistake, although the plaintiff was not privy to the mistake or implicated in its origin; but a Court of Equity will not rectify or rescind a contract merely on the ground of a mistake of one of the parties in making it (*a*). Thus, specific performance was refused in the following instances:—against the purchaser of a lot at an auction, who had by mistake bid for and bought a different lot than that which he had intended (*b*); against a vendor who had reserved a bidding for the protection of the estate, but his agent by mistake omitted to bid, and the estate was knocked down at a smaller price than he intended (*c*); against a vendor, where before the sale by auction the printed particulars and conditions of sale had been altered in writing in a material point, of which the purchaser was not aware, and the auctioneer by mistake signed the contract on a copy of the particulars which had not been altered (*d*); against the vendor of an estate who had contracted to sell under the mistaken notion that he was the owner of the fee, but who had only a limited estate (*e*); against a vendor who had agreed by mistake to sell the whole of an estate, of which he was entitled only to a part (*f*); against a landlord who had agreed to let a farm, a particular portion of which he had not intended to include in the lease (*g*); against a landlord who had signed an agreement for a lease in which he had omitted by mistake to specify that he required a premium of £500 for the lease (*h*).

**Mistake of one party known to the other.**—Where the mistake of the one party is known to the other at the time of making the contract, the fact that the latter knows of the mistake may have an important effect upon the validity of the contract.

If he has himself by misrepresentation caused the mistake for the purpose of obtaining the contract, his conduct may amount to fraud, which is the subject of separate consideration (*i*).

If he knows of the mistake of the other party but is not responsible for causing it, and in making the agreement is merely silent respecting it, the question seems to depend upon the nature of the mistake.

If the mistake is in the expression of the agreement, it would seem that he could not hold the other party to an expression of intention which he knew to be not in accordance with his real intention, and, in equity at least, the agreement would be held to be void (*j*).

(*a*) *Alvanley v. Kinnaird*, 2 Mac. & G. 1; *Sells v. Sells*, 1 Drew. & Sm. 42; 29 L. J. C. 500; *Swaishland v. Dearsley*, 29 Beav. 430; 30 L. J. C. 652.

(*b*) *Malins v. Freeman*, 2 Keen, 25.

(*c*) *Mason v. Armitage*, 13 Ves. 25.

(*d*) *Manser v. Back*, 6 Hare, 443; and see *Swaishland v. Dearsley*, 29 Beav. 430; 30 L. J. C. 652.

(*e*) *Howell v. George*, 1 Madd. 1; and

see *Hood v. Oglander*, 34 Beav. 513, 519; 34 L. J. C. 523, 529.

(*f*) *Wheatley v. Slade*, 4 Sim. 126.

(*g*) *Marquis Townshend v. Stangroom*, 6 Ves. 323.

(*h*) *Wood v. Scarth*, 2 K. & J. 33.

(*i*) *Post*, Chap. VIII, Sect. II.

(*j*) See *Garrard v. Frankel*, 30 Beav. 445; 31 L. J. C. 604; cited *post*, p. 589.

If the mistake is not in the agreement itself, but in some fact materially inducing the agreement, the question seems to depend upon the nature of the contract. In contracts relating to certain matters the one party is bound to inform the other party of all he knows concerning the matter of the contract, so as to prevent all mistake or misapprehension in the latter party; thus, in contracts of insurance it is a condition of the contract that the insured should inform the insurer of every circumstance material to the risk insured against, and the concealment by the insured of any such circumstance, however innocent avoids the contract (*a*). But unless the nature of the contract imports such a condition, the mere knowledge in the one party of a mistake in the other party, without fraud, seems, in general, to constitute no sufficient ground in law for avoiding their agreement (*b*).

**Mistake common to both parties.**—Both parties may be involved in a mistake respecting the same matter. Such mistake may occur in the expression of their agreement, or in some matter inducing their agreement, or in some matter to which the agreement is to be applied; which cases require separate consideration.

**Mistake of both parties in expressing the agreement.**—A mistake may be made by both parties in expressing their agreement, where the parties, having agreed upon certain terms, further agree to reduce those terms into writing, and to be bound by the written document as containing the terms of their agreement, but an error is made in reducing the terms into writing, so that the writing agreed upon as conclusive between them does not contain the agreement intended to be made. The rule of law here applies that the agreement in writing cannot be varied by external evidence; consequently, the parties are bound in law by the written document which they have accepted as their agreement.

The plaintiff made a written agreement with the defendant to do work for him in certain houses “in South Street and Southampton Street,” and brought an action upon the agreement, stating it in the declaration according to its terms; under the plea of *non assumpsit* it was held that the plaintiff was entitled to the verdict on proof of the written agreement, and that evidence was not admissible on the part of the defendant to show that the word “and” was inserted by mistake, and that the agreement really intended to be made was for work in houses “in South Street, Southampton Street” (*c*). A policy of insurance was made on the profits of a cargo to be carried by a particular ship “beginning the adventure from the loading on board the ship;” the plaintiff was not permitted to vary the terms of the policy by a correspondence, showing that the contract was intended to include an insurance against the profits being lost by reason of a loss of the ship

(a) See *post*, p. 608. (b) See *post*, p. 595. (c) *Hitchin v. Groom*, 5 C. B. 515.

during her voyage to the port of loading, although the premium was at a higher rate than would have been charged for an insurance not covering such risk (a).

Where the mistake in a written agreement is so obvious on the face of it as to leave no doubt of the intention of the parties without the assistance of external evidence, the contract is construed according to the obvious intention of the parties. Accordingly, where it was manifest on the face of an instrument that one name had been written by mistake for another, the Court read the instrument with the mistake corrected (b). So, where in a bond the condition was written that it should be void if the obligor did "not" pay a sum of money, the Court recognized the "not" as inserted by mistake, and read the bond without it (c).

A bond stated that the obligor became bound in 7700, without adding any denomination, but the condition showed that the bond was given to secure the payment of certain sums of money, reckoned in pounds sterling, in manner therein mentioned; the Court held that the intention sufficiently appeared from the whole bond, that the obligor should become bound in 7700 pounds sterling, and that the word "pounds" might be supplied (d). So the word "month" in a written agreement, which *prima facie* means lunar month, has been construed by the context as meaning *calendar month* (e).

A bill of exchange was headed with the figures £245 and was drawn upon a stamp sufficient for that amount, but was expressed in words in the body of the bill to be drawn for two hundred pounds; it was held to be a bill for £200, and evidence was not admitted to show that it was intended to be for £245 and that the words "and forty-five" were omitted by mistake (f). An agreement dated 24 October referred to a bill of exchange "payable at three months from this date," and it appeared there was a bill of exchange dated 25 October and agreeing in all other respects with the description of the bill referred to in the agreement; it was held that the bill was sufficiently identified in the agreement (g).

Where the parties themselves subsequently alter the agreement so as to make it conform with their original intention, extrinsic evidence is admissible to explain the alteration and to show that the agreement as originally framed did not accord with the real agreement (h).

(a) *Halhead v. Young*, 6 E. & B. 312; 25 L. J. Q. B. 290.

(b) *Wilson v. Wilson*, 23 L. J. C. 697.

(c) Case cited by Lord St. Leonards, 23 L. J. C. 697, 703.

(d) *Coles v. Hulme*, 8 B. & C. 568.

(e) *Lang v. Gale*, 1 M. & S. 111; *R. v. Chawton*, 1 Q. B. 247.

(f) *Saunderson v. Piper*, 5 Bing. N. C. 425.

(g) *Way v. Hearne*, 13 C. B. N. S. 292; 32 L. J. C. P. 34.

(h) See *post*, Chap. XIII, Sect. II, "Alteration of Written Instrument."

**Rules of Equity as to agreements containing a mistake.**—The strict rule of law is largely tempered by the doctrines and practice of the Courts of Equity; for a Court of Equity will not enforce a contract which has been drawn up by mistake in terms not in conformity with the real agreement of the parties; and will in some cases reform or set aside the mistaken agreement.

The defence that the contract sought to be enforced is not in conformity with the real agreement, but has been drawn up incorrectly by mistake, may be set up in answer to a bill for specific performance (*a*). In such case, if the plaintiff will not accept specific performance with the variation in the agreement set up and proved by the defendant, his bill is dismissed; but if he is willing to adopt the variation, he may have a decree (*b*); and specific performance of the agreement with the variations proved may be decreed at the instance of the defendant without a cross bill (*c*).

Upon sufficient proof of the mistake and of the agreement really made, a Court of Equity exercises a jurisdiction to rectify the contract, and to enforce it in its corrected state (*d*). In the exercise of this jurisdiction a Court of Equity necessarily receives evidence of the real agreement in variation of the terms of the written agreement (*e*).

“In the ordinary case of rectifying mistakes in an instrument where it is sought to alter the instrument in any prescribed or definite mode, the mistake must be the concurrent mistake of all the parties. In such cases it is necessary to prove not only that there has been a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really so intended; for in such a case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument” (*f*).

Where a document has been signed as an agreement in a common mistake as to its contents, and it appears that no real agreement was come to between the parties according to which it might be rectified, the Court will set it aside (*g*). An agreement for a lease was

(*a*) *Joyes v. Statham*, 3 Atk. 388; *Garrard v. Grinling*, 2 Swanst. 244; *Lord Gordon v. Marquis of Hertford*, 2 Madd. 106.

(*b*) *Clark v. Grant*, 14 Ves. 519; *Ramsbottom v. Gosden*, 1 V. & B. 165; *London and Birmingham Ry. Co. v. Winter*, Cr. & Ph. 57; *Martin v. Pycroft*, 2 De G. M. & G. 785; 22 L. J. C. 94.

(*c*) *Fife v. Clayton*, 13 Ves. 546.

(*d*) See *Henkle v. Royal Exchange Ass. Co.*, 1 Ves. Sen. 317; *Baker v.*

*Paine*, 1 Ves. Sen. 456; *Motteux v. London Ass. Co.*, 1 Atk. 545.

(*e*) *Ball v. Storie*, 1 Sim. & Stu. 210, 219.

(*f*) Per Turner, L. J., *Bentley v. Mackay*, 31 L. J. C. 697, 709; per Romilly, M. R., *Murray v. Parker*, 19 Beav. 305, 308.

(*g*) *Id.*; *Calverley v. Williams*, 1 Ves. Jun. 210; *Price v. Ley*, 32 L. J. C. 530; *Fowler v. Scottish Life Ass. Co.*, 28 L. J. C. 225.

drawn up and signed stating two different sums for the rent in different parts of the agreement, the larger sum being that previously settled and intended to be inserted; afterwards the lease was drawn up as agreed, but stated the smaller sum as the rent, and was executed by the lessor in ignorance of the mistake, and by the lessee with knowledge of it; it was held that the lease could not be rectified against the lessee, because the agreement for the lease contained contradictory statements as to the amount of the rent, but that the lessee should have an option to take a corrected lease, or to give up the one executed, paying for the use and occupation of the premises up to that time at the higher rent (a).

Where the contract is within the Statute of Frauds, the real agreement cannot, in general, be proved without satisfying the requirements of that statute (b); but it has been held to be no objection to a claim for specific performance of a written contract, that a provision was verbally agreed to which was not inserted in the writing, if the plaintiff will consent to the performance of the omitted term (c).

**Mistake of both parties in matter inducing the agreement.**—Where the agreement is induced by a mistake common to both parties, without which mistake the agreement would not have been made, the question arises whether the agreement is made absolutely, or only conditionally upon and with reference to the state of circumstances supposed by mistake, so that upon the real state of circumstances the agreement is inoperative and void.

A contract was made for the sale of a cargo, then supposed to be on board a ship on its voyage, but which, unknown to both parties, had ceased to exist at the time of the sale; it was held that the contract imported the condition that the cargo was in existence, and that, this not being the case, the contract was void, and the vendor could not recover the price from the purchaser (d). A contract of sale of an annuity during the life of a person was held to be conditional upon the annuitant being alive at the time of the sale; so that, he having previously died and the purchase money having been paid in ignorance of that fact, it was held that the sale was void, and that the purchaser was entitled to recover back his money (e). A policy of insurance was renewed during the days of grace allowed after the expiration of the policy by the payment and acceptance of the premium,

(a) *Garrard v. Frankel*, 30 Beav. 445; 31 L. J. C. 604.

(b) See *Att. Gen. v. Sitwell*, 1 You. & Coll. Ex. 559, 583; *Rich v. Jackson*, 4 Bro. C. C. 514; 6 Ves. 334 (37); *Woollam v. Hearn*, 7 Ves. 211.

(c) *Martin v. Pycroft*, 2 De G. M. & G. 785; 22 L. J. C. 94; and see Fry on Specific Performance, § 519-535.

(d) *Couturier v. Hastie*, 9 Ex. 102; 5 H. L. C. 673; 25 L. J. Ex. 253.

(e) *Strickland v. Turner*, 7 Ex. 208.

both parties being ignorant that the life insured had previously died during the days of grace; it was held that the renewal, being conditional upon the insured being then alive, was void (*a*), and that the insurer might recover back the premium as having been paid under a mistake of fact (*b*).

An agreement was made for the sale of a remainder in fee expectant on an estate tail, and an absolute bond was given to secure the purchase money; at the time of the sale the tenant in tail had suffered a recovery and destroyed the remainder, of which both parties were ignorant; a Court of Equity held the agreement void and cancelled the bond, upon the ground that the parties had contracted upon the supposition that the recovery had not then been suffered (*c*). An agreement was made between the assignee of the tenant for life of an estate and the person entitled in remainder respecting the timber on the estate, under the supposition that the tenant for life was then alive and entitled to cut the timber, but in fact he was then dead; it was held that the agreement was void both in equity and at law (*d*).

The plaintiff contracted with the defendant for the purchase of an estate, which was supposed by both the parties, and was described in the agreement to contain 21,750 acres, but in fact contained only 11,814; it was held that the contract could not be enforced on either side (*e*). So, where a contract was made for the sale of a manor described as embracing a particular parish, and supposed by both parties to do so, and it was subsequently discovered that it included waste lands beyond the parish which neither party contemplated to be within the subject of the purchase, the Court held that the contract could not be enforced in a manner to include those lands (*f*). So, an agreement for the sale of shares in a company, made in ignorance that a petition for winding up the company had been presented, was held not to be enforceable, so as to make the purchaser a contributory (*g*).

But the contract may be unconditional, although the parties are under a mistake respecting some matter which induces the contract. Thus, the defendant by deed sold and assigned a ship to the plaintiff, and covenanted that he then had power to sell the ship; the plaintiff sued the defendant for a breach of this covenant, and it appeared that the ship was a wreck at the time of the sale, of which both parties were ignorant; the Court held that the contract was absolute, and if

(*a*) *Pritchard v. Merchants Life Insurance Soc.*, 3 C. B. N. S. 622; 27 L. J. C. P. 189.

(*b*) Per Byles, J., *ib.*

(*c*) *Hitchcock v. Giddings*, 4 Price, 135.

(*d*) *Cochrane v. Willis*, 35 L. J. C. 36; L. R. 1 Ch. Ap. 58.

(*e*) *Earl of Durham v. Legard*, 34 L. J. C. 589; and see *Price v. North*, 2 You. & Col. Ex. 620; *Davis v. Shepherd*, L. R. 1 Ch. Ap. 410.

(*f*) *Baxendale v. Seale*, 19 Beav. 601.

(*g*) *Emmerson's Case*, L. R. 1 Ch. Ap. 433.



the ship had ceased to exist as a ship at the time of the sale the covenant was broken, but if it then still existed as a ship, however damaged, there was no breach, as the covenant imported no obligation with respect to the condition of the ship (*a*).

Upon the sale of a specific lease of premises which both parties supposed to be for a certain term, but which was afterwards discovered to be for a longer term and of greater value, it was held that there was no mistake as to the substance of the thing sold, and a Court of Equity refused, after a lapse of time, to give any relief to the vendor (*b*).

**Agreement induced by mistake of both parties in matter of law.**—It seems that a common mistake of a matter of law inducing an agreement would modify its effect in equity, as applied to the true state of the law, upon the same principle as a common mistake upon a matter of fact; and that a Court of Equity would grant relief against an agreement made under such circumstances (*c*).

**Mistake of both parties as to the application of the agreement.**—Where an agreement is capable of being applied to different things or in different ways, and is accepted by each party with a different application, there is no real agreement between them and consequently no contract. It is not competent to a party to an agreement to assert an application of the agreement inconsistent with the terms agreed upon as expressing the common intention; but he is at liberty to show that it was understood by him to apply in a manner consistent with its terms, but different from the application accepted by the other party.

**Latent ambiguity.**—In such cases the agreement is said to contain a latent ambiguity, or one which appears only in the course of applying it. "A latent ambiguity is where it is shown that words apply equally to two different things or subject-matters; and then evidence is admissible to show which of them was the thing or subject-matter intended" (*d*).

**Patent ambiguity.**—What is called a patent ambiguity, that is, a doubt or uncertainty appearing in the terms of the agreement as expressed by the parties themselves, cannot be altered or explained by extrinsic evidence; and if it is incapable of a rational interpretation, the agreement, at least to the extent of the ambiguity, is necessarily void (*e*).

A contract was made for the sale by the plaintiff to the defendant

(*a*) *Barr v. Gibson*, 3 M. & W. 390.

(*b*) *Okill v. Whittaker*, 1 De G. & Sm. 83; 2 Phil. 338, see the passages from the Digest cited by V. C. Knight Bruce in this case.

(*c*) *Re Sazon Life Assurance Soc.* 2 J. & H. 408; 32 L. J. C. 206; and *Stone v.*

*Godfrey*, 5 De G. M. & G. 76; 23 L. J. C. 769; Story Eq. Jur. § 125-138.

(*d*) Per Alderson, B., *Smith v. Jeffries*, 15 M. & W. 561, 562.

(*e*) See *Coles v. Hulme*, 8 B. & C. 568; *Alder v. Boyle*, 4 C. B. 635;

of a cargo of cotton "to arrive ex Peerless from Bombay," and it appeared that there were two ships named Peerless then sailing from Bombay, and the plaintiff meant one and the defendant meant the other; it was held that there was no contract; and in an action for not accepting the cargo of cotton by the one ship Peerless, a plea that the defendant meant another ship Peerless, and that the plaintiff was not ready to deliver cotton from that Peerless, was held a good plea (a).

Upon a sale of land by auction the particulars and conditions of sale were so worded that it was doubtful whether the timber on certain lots was included in the price of the lot or was to be valued separately, the plaintiff asserting the one construction and the defendant the other; specific performance in either view was refused, upon the ground that "if the one intended to sell upon one set of terms as he conceived them, and the other intended to buy according to a different set of terms, there was in reality no agreement between them" (b).

**Mistake as matter for pleadings at law upon equitable grounds.**—Since the admission of pleadings upon equitable grounds in actions at law under the C. L. P. Act, 1854, s. 83—86, a mistake in an agreement may in some cases be set up in an action at law. The courts of law allow pleadings upon equitable grounds only where by the judgment at law they can do complete and final justice, and settle all the equities between the parties; and, therefore, having no jurisdiction to pronounce conditional judgments, or to impose or enforce special terms upon the parties, they allow pleadings upon equitable grounds only where a Court of Equity upon the same circumstances would decree an absolute, unconditional and perpetual injunction to stay the proceedings at law (c).

Hence, a mistake in an agreement, of the kind in which the relief in equity would be by reforming the agreement, cannot be relied on as ground for an equitable pleading; because the Court of Law cannot apply the proper remedy (d). Accordingly, a plea on equitable grounds that the defendant accepted a bill under a mistake as to the date was not allowed (e); and a replication on equitable grounds that a release by deed was executed in mistake of its legal effect was held bad on demurrer (f).

But where a contract containing a mistake in its terms has been completely executed according to the terms intended by the parties so that no object remains to be served by reforming the contract, the

(a) *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160.

(b) *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & Beav. 524; and see *Neap v. Abbott*, Coop. 333; *Baxendale v. Seale*, 19 Beav. 601.

(c) See *Bullen & Leake*, Prec. Pl. 2nd ed. 486.

(d) *Perez v. Oleaga*, 11 Ex. 506; 25 L. J. Ex. 65; *Solvency Mutual Guarantee Co. v. Freeman*, 7 H. & N. 17; 31 L. J. Ex. 197.

(e) *Drain v. Harvey*, 17 C. B. 257; 25 L. J. C. P. 81.

(f) *Teed v. Johnson*, 11 Ex. 840; 25 L. J. Ex. 110.

mistake may be relied upon as matter for an equitable pleading in answer to the contract, if alleged according to the written terms (*a*). So also, where it would be useless to reform the contract according to the terms intended by reason of lapse of time or other circumstances having rendered a further performance of it impracticable, the mistake may form an absolute and conclusive answer to the contract in an equitable pleading (*b*).

Where the mistake is of that kind that equity would grant an absolute injunction, it affords a complete answer to an action on the contract, and is a sufficient ground for an equitable pleading. Thus, an equitable plea to an action on a contract that the defendant was intended by both parties to sign it only as agent in order to bind his principal, and that he signed it in a manner to make himself personally liable by mistake, was held to be a good plea (*c*). So, a replication on equitable grounds, to a plea of a release, that the release was worded to include the claim sued for by a mistake, was held good (*d*). In an action on a deed of dissolution of partnership in a business, for a breach of covenant in practising the business in a certain district, a plea upon equitable grounds, that the covenant was worded by mistake and contrary to the intention of the parties so as to include the district in which the breach of covenant was charged, was allowed, as showing grounds for a perpetual injunction against the action (*e*).

SECTION II.—FRAUD.\*

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AN agreement, apparently complete and sufficient to create a contract, may be vitiated by fraud; and a party to an agreement may avoid its effect by showing that he was induced to make the agreement by the fraud of the other party. The question here arises as to what constitutes such fraud as entitles the party defrauded to avoid the effect of his agreement, and under what circumstances, and with what consequences such avoidance may take place.

(*a*) *Steele v. Haddock*, 10 Ex. 643; 1 H. & C. 202; 30 L. J. Ex. 273; 31 *ib.*  
*Vorley v. Barrett*, 1 C. B. N. S. 225; 451.  
 26 L. J. C. P. 1. (*d*) *Lyall v. Edwards*, 6 H. & N. 337;  
 30 L. J. Ex. 193.  
 (*b*) *Borrowman v. Rossel*, 16 C. B. N. S. 58; 33 L. J. C. P. 111. (*e*) *Luce v. Izod*, 1 H. & N. 245; 25  
 L. J. Ex. 307.  
 (*c*) *Wake v. Harrop*, 6 H. & N. 768; \* Ch. I, Sect. II, § 2, Leake.  
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**Fraud.**—Fraud, in general, consists in inducing a person to act upon some untrue statement or representation intentionally made for that purpose. In fraud, there is necessarily a mistake or misapprehension in the party defrauded, which alone would not vitiate his dealings with others; but there is the additional circumstance that the party with whom he deals intentionally causes the mistake for the purpose of effecting the dealing, and this precludes the party so occasioning the mistake from holding the other bound by it (*a*).

**Misrepresentation of fact.**—The misrepresentation by which the fraud is effected must be respecting some matter of fact. A misrepresentation of a matter of law is not a sufficient foundation to constitute fraud in law, because the law is presumed to be equally within the knowledge of all. Thus, the misrepresentation of the legal effect of a written agreement, which a party signs with a full knowledge of its contents, is not a sufficient ground in law for avoiding the agreement (*b*). But if a person in dealing with another misleads him, or takes advantage of his ignorance respecting his legal position and rights, though there may be no legal fraud, the case may come within the jurisdiction exercised by Courts of Equity to prevent imposition (*c*).

**Misrepresentation of intention.**—A misrepresentation of a matter of intention not amounting to a matter of fact, though it may have influenced the agreement, is not a sufficient ground for avoiding the legal effect of the agreement. Where the plaintiff was induced to grant the defendant a lease of certain premises upon a representation by him that he intended to use the premises for a stated purpose, whereas he intended to use them and did use them for a different and illegal purpose; it was held the misrepresentation did not entitle the plaintiff to avoid the lease (*d*). Upon a contract of sale, a misrepresentation made by the purchaser to the seller, that certain partners of the purchaser, interested in the purchase, would not consent to his giving more than a stated sum for the subject of sale, was held not sufficient ground to entitle the seller to avoid the sale (*e*).

So, if a party to an agreement, at the time of making it, has the intention of breaking it when made, the agreement is not thereby vitiated and the contract is not the less binding; if the intention is carried into effect, there is a breach of contract attended with the usual liability for a breach (*f*).

Although representations of mere intention made at the time of the agreement for the purpose of inducing it are immaterial to the validity of the agreement in law, they are, in general, held binding in

(*a*) *Lewis v. Jones*, 4 B. & C. 506.

(*b*) See *Story, Eq. Jur.* § 117–138.

(*c*) *Feret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185,

(*d*) *Vernon v. Keys*, 12 East, 632.

(*e*) *Hemingway v. Hamilton*, 4 M. & W. 115.

equity; and the Court will, according to the circumstances, refuse specific performance of the agreement or rescind it, if the expectations raised by such representations are not satisfied (a).

**Exaggerated commendations.**—Exaggerated commendations of the subject of the agreement of a general character, and not embodying specific representations of fact, are not, in general, sufficient ground for avoiding the effect of the agreement. Thus, a representation made upon the sale of an advowson that “a voidance was likely to occur soon,” (b) and a representation upon the sale of land that it was “uncommonly rich water meadow;” (c) although they were found to be exaggerated representations, were held not to be sufficient ground for refusing specific performance of the contracts induced by them. But where upon a sale of growing timber the trees were represented as of an average size of fifty feet, which in fact averaged only thirty-five, specific performance was refused (d). A prospectus of a mine containing statements respecting the general appearance and promise of the mine, expressed in glowing and exaggerated colors, was held in equity not to be a sufficient ground of fraud (e).

**Concealment of fact.**—Fraud may be effected by an active concealment of a fact material to be known by the other party, without any express representation respecting it. As, where a person sold a vessel with all faults, and before the sale took her from the ways on which she lay, and kept her afloat in a dock, in order to prevent an examination of her bottom which he knew to be unsound, the purchaser was held entitled to avoid the contract on the ground of fraud (f). So, where a person sold a log of mahogany, having turned it so as to conceal a hole in the underneath side (g).

As to the effect of mere silence without active concealment, Lord Mansfield laid down the following as the governing principles applicable to all contracts and dealings:—“Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and believing the contrary. But either party may be innocently silent as to grounds open to

(a) *Beaumont v. Dukes*, 1 Jac. 422; *Myers v. Watson*, 1 Sim. N. S. 523; *Peacock v. Penon*, 11 Beav. 355; *Truill v. Baring*, 33 L. J. C. 521.

(b) *Trower v. Newcombe*, 3 Mer. 704.

(c) *Scott v. Hanson*, 1 Sim. 13.

(d) *Brook v. Rounthwaite*, 5 Hare, 298.

(e) *Jennings v. Broughton*, 17 Beav. 234; 5 De G. M. & G. 126; and see *Kisch v. Central Ry. Co. of Venezuela*, 34 L. J. C. 545, 552, where Turner, L. J. observed, “It is so universally known and

understood that the prospectus of a company never, in fact, contains a strictly accurate account of its prospects and advantages, that the validity of bargains founded on such instrument cannot properly be tried by so severe a test as may be applied in other cases.” This observation was adopted by the M. R. in *Denton v. Macneil*, L. R. 2 Eq. 355; *Ross v. Estates Investment Co.* 36 L. J. C. 54; L. Rep. 3 Eq. 122; *Hallows v. Fernie*, Weekly Notes, 1867, p. 53.

(f) *Schneider v. Heath*, 3 Camp. 506.

(g) See *Udell v. Atherton*, 7 H. N. 172; 30 L. J. Ex. 337.

both to exercise their judgment upon. ‘*Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causā velis eos, quorum intersit id scire.*’ This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favor of the party misled by his ignorance of the thing concealed” (a).

The defendant bought a picture of the plaintiff under a delusion as to the ownership of it, and the agent of the plaintiff employed to sell the picture was aware of the delusion of the defendant and took advantage of it in effecting the sale; Lord Ellenborough held that the defendant might avoid the contract on the ground of fraud (b). A debtor compounded with his creditor, knowing that the latter was under a false impression as to the value of his estate; Tindal, C.J., held that the creditor might avoid the composition and recover his debt in full (c). The defendant purchased a policy of insurance from the plaintiff, having ascertained that the person whose life was insured was dangerously ill, and without communicating that fact to the plaintiff, who was not aware of it; Rolfe, B., held that the plaintiff might avoid the sale and recover the policy (d).

The interest of a husband in reversionary property of his wife which from its nature was subject to the contingency of the wife surviving her husband before a reduction into possession and also to the claim of the wife for a settlement, was offered for sale, and the purchaser knowing the fact of the wife’s death, obtained a purchase of the property from the vendors, who were ignorant of the death; the Court of Chancery set aside the sale (e). So, where a lessee for lives obtained an agreement for a renewal of his lease, knowing but suppressing the fact that the surviving life for which he held was *in extremis*, a Court of Equity refused to grant specific performance of the agreement (f). Where an alleged interest in certain property was sold by auction, and the vendor knew at the time of the sale that the interest sold was of no value, though he made no representation of the value, the purchaser having no means of ascertaining whether it was of any value or not, the sale was set aside in equity (g). Upon the treaty of a sale of marsh land the vendor industriously concealed the circumstance that it required a large annual outlay for the repair of a

(a) *Carter v. Boehm*, 3 Burr. 1905; 1 Smith’s L. C. 5th ed. 472; see Cicero de Off. lib. iii, cap. xiii, cited more fully by Lord Abinger in *Cornfoot v. Fowke*, 6 M. & W. 358, 380.

(b) *Hill v. Gray*, 1 Stark. 434; explained in *Keates v. Earl Cadogan*, 10 C. B. 591, 600.

(c) *Vine v. Mitchell*, 1 Moo. & Rob. 337.

(d) *Jones v. Keen*, 2 Moo. & Rob. 348.

(e) *Turner v. Harvey*, 1 Jac. 169.

(f) *Ellard v. Llandaff*, 1 Ball & B. 241.

(g) *Smith v. Harrison*, 26 L. J. C. 412.

river wall ; specific performance was refused against the purchaser (a). The defendant sold and conveyed an estate to the plaintiff, knowing at the time but concealing the fact that part of the land was an encroachment upon a common to which he had no title; the Court set aside the sale as having been effected by fraud (b).

**Selling chattel with latent defect.**—Upon this principle it seems that a person knowingly selling a chattel with a latent defect, without disclosing it to the buyer, is guilty of a fraud, which would entitle the buyer to avoid the sale (c). But he may expressly stipulate that the buyer is to take the chattel with all faults ; it is then immaterial how many faults exist within the knowledge of the seller, unless he uses some artifice to disguise them, and to prevent their being discovered by the buyer (d).

**Selling chattel with patent defect.**—If a person sells a chattel with a patent defect in it, and the buyer has an opportunity of inspecting it, the seller does not commit a fraud by not pointing out the defect (e). So, the owner of a house which is out of repair is not bound to inform a proposed tenant of the state of repair which the tenant can examine into himself ; and if the owner lets the house, knowing it to be unfit for habitation by reason of its ruinous state, without communicating that fact to the tenant, the latter is not, therefore, entitled to avoid the letting on the ground of fraud (f).

On the occasion of a sale it is not, in general, the duty of the purchaser to inform the vendor of the circumstances he may be acquainted with, which may make it desirable for him to purchase the property (g). Accordingly, where a first mortgagee with a power of sale, having made an advantageous contract for the sale of the mortgaged property, purchased the interest of a second mortgagee, who supposed the property was insufficient for both mortgages, without informing him of his contract, the transaction was held valid, and the first mortgagee was held entitled to retain the whole of the proceeds of the sale (h).

**Fraudulent intention.**—An intention to deceive is a necessary ingredient of fraud ; and when a person makes a false statement to another for the purpose of inducing the other to act upon it, the intention to deceive depends upon his knowledge or belief respecting the falsehood of the statement. If he knows the statement to be false, or

(a) *Shirley v. Stratton*, 1 Bro. C. C. 440.

(b) *Edwards v. M'Leay*, Coop. 308.

(c) See *Mellish v. Motteux*, Peake, 115.

(d) *Baglehole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, 3 Camp. 506; and see *Taylor v. Bullen*, 5 Ex. 779.

(e) *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J. Ex. 322.

(f) *Keates v. Earl Cadogan*, 10 C. B. 591.

(g) See per Lord Thurlow, L. C., *Fox v. Mackreth*, 2 Bro. C. C. 400, 420; *Dolman v. Nokes*, 22 Beav. 402; *Tate v. Williamson*, L. R. 1 Eq. 528.

(h) *Dolman v. Nokes*, *supra*.

if he does not believe it to be true, the law imputes to him a fraudulent intention (*a*).

Formerly the opinion prevailed with some judges that if a person induced another to act by a false statement he was equally responsible for the falsehood of the statement whether he believed it to be true or not; and if he made the statement with a belief in its truth, he was described as committing "legal without moral fraud," which they held sufficient to vitiate an agreement or to give a cause of action for the damages caused by it. But it has been decided that this opinion is erroneous, and that a fraudulent intention, as above described, is essential in order to constitute such fraud as is recognized in law (*b*).

The phrase "legal without moral fraud" is still sometimes used to express the case of a person acting in such a manner and under such circumstances that a fraudulent intention is imputed to him, although he was not in fact instigated by a morally bad motive; for instance, where the defendant had accepted a bill of exchange in the name of the drawee, purporting to do so by procuration, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, the jury negatived a fraudulent intention in fact; but the Court held that the defendant had committed a fraud in law, by making a representation which he knew to be untrue, and which he intended others to act upon (*c*).

The fraudulent intention does not necessarily include an intention to benefit the party making the representation, or an intention to injure the party to whom the representation is made (*d*).

If a person makes a statement of fact, in the belief that it is true, though it is not true in point of fact, there is no fraudulent intention (*e*). And a fraudulent intention cannot be imputed to a person by reason merely of his having constructive notice that a representation made by him is untrue, where he has no actual knowledge that it is untrue (*f*). But a fraudulent intention is established if a person makes a statement false in fact without believing it to be true, although he may not have positive information that it is false (*g*). Where a

(a) *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114.

(b) See *Cornfoot v. Fowke*, 6 M. & W. 358; *Evans v. Collins*, 5 Q. B. 804; and the notes to *Pasley v. Freeman*, 2 Smith's L. C. 5th ed. 68.

(c) *Polhill v. Walter*, 3 B. & Ad. 114; per Parke, B., *Murray v. Mann*, 2 Ex. 538, 541.

(d) *Foster v. Charles*, 6 Bing. 396; 7

Bing. 105; per Lord Campbell, *Wilde v. Gibson*, 1 H. L. C. 605, 633.

(e) *Ornrod v. Huth*, 14 M. & W. 651, 664; *Haycraft v. Creasy*, 2 East, 92; *Rawlings v. Bell*, 1 C. B. 951, 959; *Cornfoot v. Fowke*, 6 M. & W. 358; *Early v. Garrett*, 9 B. & C. 928; *Shrewsbury v. Blount*, 2 M. & G. 475; *Evans v. Collin*, 5 Q. B. 804.

(f) *Wilde v. Gibson*, 1 H. L. C. 605.

(g) *Taylor v. Ashton*, 11 M. & W. 401, 415; *Evans v. Edmunds*, 13 C. B. 777, 786.



person was induced to take shares in a company by a prospectus issued by the directors containing false statements, which the directors stated in an affidavit they believed to be true, a Court of Equity granted an injunction to restrain an action for calls upon the shares, because it did not appear that the directors had any reasonable ground for believing the statement to be true (*a*).

Where a person makes a statement, false in fact, which he believes to be true, if he at some former time knew the truth respecting the matter and ought to have remembered it, but forgot it at the time of making the statement, it is held in equity to be equivalent to a fraud and vitiates an agreement induced by the statement (*b*).

Where a person makes a statement false in fact, which at the time he believes to be true, but afterwards discovers that it is false, if after he has become aware that his statement was false he suffers the other party to continue in error and act in the belief of his statement, this, from the time of the discovery, becomes a fraudulent misrepresentation, even though it was not so originally (*c*). So, where a statement is made which is true at the time of making it, but which becomes falsified by change of circumstances to the knowledge of the party making it, if he does not inform the other party of the change, it is equivalent to a wilful misrepresentation and will vitiate an agreement induced by it (*d*).

If a person is under a special duty to give correct information to another, and makes a statement which is in fact false, though he is not aware that it is false and believes it to be true, it is equivalent to a fraud, in that he cannot take advantage of the statement, and a contract made with him on the faith of it may be set aside. Where a partner in a bank, treating with a person about joining the partnership, made a statement respecting the affairs of the bank which was in fact false, though he was ignorant of the falsehood, the contract to join the partnership was set aside, on the ground that the partner making the statement was bound, in relation to the incoming partner, to know the state of the partnership affairs, and to give correct information (*e*).

There are some contracts, as contracts of insurance, which are made on the basis of the truth of the statements of one of the parties; and such contracts are avoided by misrepresentation or concealment of a material fact, without any fraudulent intention (*f*).

(*a*) *Smith v. Reese River Co.*, L. Rep. 2 Eq. 264.

(*b*) *Burroughs v. Lock*, 10 Ves. 470; *Pulsford v. Richards*, 17 Beav. 87, 94; *Slim v. Croucher*, 2 Giffard, 37; 29 L. J. C. 273.

(*c*) See *Reynell v. Sprye*, 1 De G. M. & G. 660, 709.

(*d*) See *Traill v. Baring*, 33 L. J. C. 521.

(*e*) *Rawlins v. Wickham*, 1 Giffard, 355; 3 De G. & J. 304; 28 L. J. C. 188.

(*f*) See *post*, p. 608.

**Fraud inducing the contract.**—The fraud must be respecting a fact which materially induces the agreement.

The phrase of the civil law "*dans locum contractui*" has been frequently adopted to describe the necessary materiality of the fraud; and it has been interpreted by saying that the fraud must consist in "the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer, that he would not have entered into it; or the suppression of a fact the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether" (a).

The defendant became surety for a loan advanced by the two plaintiffs, who represented that it was made by a joint-stock loan company regularly constituted with certain stated rules, but in fact it was lent by the two plaintiffs only, who called themselves such company, which did not otherwise exist; it was held that the misrepresentation respecting the existence and constitution of the company was immaterial, and was not the real inducement to contract, which was to obtain the loan for the accommodation of the borrower (b). The plaintiff, for a particular purpose, was party to a false representation of another person's accounts, whereby the latter appeared to have a balance in his favor; subsequently, for the different purpose of getting an execution out of the house of the latter, he joined in a bill, upon an indemnity given him by the defendant, who was then cognizant of the state of accounts previously represented, but not of the true state of accounts; it was held that the false representation not having been made with reference to the transaction in question, and not having influenced the defendant, the contract was not obtained by fraud (c).

Where, notwithstanding misrepresentations made by the one party, the other relies upon his own information and judgment, and not upon the representations made to him, the agreement is not in fact induced by fraud, and cannot be avoided on that ground (d).

Whatever misrepresentation is contradicted by the actual knowledge of the other party cannot have induced the contract, and therefore cannot be ground for avoiding it (e). So, "if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent in a court of justice to impute to him a knowledge of the result, which upon due inquiry he

(a) *Pulsford v. Richards*, 17 Beav. 87, 96; and see per Lord Cranworth, *National Exchange Co. v. Drew*, 2 M'Q. 103, 120; *Attwood v. Small*, 6 Cl. & Fin. 232, 444, 395; *Canham v. Barry*, 15 C. B. 597.

(b) *Green v. Gosden*, 3 M. & G. 446.

(c) *Way v. Hearne*, 11 C. B. N. S. 774; 32 L. J. C. P. 34.

(d) *Clapham v. Shillito*, 7 Beav. 146; *Attwood v. Small*, 6 Cl. & F. 232.

(e) *Jennings v. Broughton*, 5 De G. M. & G. 126, 131; *Lowndes v. Lane*, 2 Cox, 363; *Vigers v. Pike*, 8 Cl. & F. 562, 650.

ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded" (a). Misrepresentations were made respecting the value of a mine in which the plaintiff bought shares, but he himself visited the mine, and examined into its condition; it was held that he had not relied on the representations and was not entitled to avoid his contract on the ground that they were false (b). Where an estate put up for sale was described as in a ring fence, the purchaser, having inspected the estate before he purchased, was held bound to complete, notwithstanding the description was false (c).

Mere constructive notice, as of the contents of a deed mentioned in the conditions of sale, is not sufficient to exclude the purchaser from asserting that he relied on an express representation made to him respecting its contents (d). But upon the sale of leaseholds it is the duty of the purchaser to inquire into the terms of the original lease; and therefore he cannot resist performance on the ground of misrepresentations respecting those terms (e).

Where a person in fact relies upon misrepresentations made to him for the purpose of deceiving him, he may be entitled to avoid the agreement which he is thereby induced to make, notwithstanding he had the means of obtaining information of the truth which he did not use. In an action for fraudulently inducing a sale of land by misrepresenting the value of the rents, Holt, C. J., said, "If the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely on his particular; then if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, then it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular" (f). So, where the purchaser of a public house relied on misrepresentations of the seller as to the business done, which he might have tested by the seller's books, he was held to be entitled to avoid the sale (g).

**Fraud by a stranger to the contract.**—A contract between two parties cannot be avoided by one of them on the ground that he was induced to make it by the fraud of a third party, in which the other party to the contract was not implicated (h).

(a) *Clapham v. Shillito*, 7 Beav. 146, 149; *Attwood v. Small*, 6 Cl. & F. 232.

(b) *Jennings v. Broughton*, *supra*.

(c) *Dyer v. Hargrave*, 10 Ves. 505.

(d) *Drysdale v. Mace*, 2 Sm. & Gif. 225; *Kisch v. Central Ry. Co. of Venezuela*, 34 L. J. C. 545.

(e) *Pope v. Garland*, 4 Y. & Col. Ex. 394.

(f) *Lysney v. Selby*, 2 L. Raym. 1118, 1120; and see *Reynell v. Sprye*, 1 De G. M. & G. 660, 710; 21 L. J. C. 633, 655; *Cox v. Middleton*, 2 Drewry, 209; 23 L. J. C. 618.

(g) *Dobell v. Stevens*, 3 B. & C. 623.

(h) *Masters v. Ibberson*, 8 C. B. 100; and see per Buller J., *Master v. Miller*, 4 T. R. 320, 337.

Where a person has been induced to take shares in a company by false and fraudulent representations emanating from the company or for which it is responsible, he may avoid the contract on the ground of fraud (*a*); but if he has been induced to take shares from the company by fraudulent representations made by some person, not being an agent of the company authorized to make any representations or authorized to deal on behalf of the company, although he may have a right of action against the person who made the false representations, he is bound by his contract with the company and cannot repudiate the shares (*b*). So, if a person has been induced to buy shares in a company from the holder of them, by false and fraudulent representations emanating from the company, he cannot avoid his purchase or repudiate his shares (*c*).

So in equity, "in the case where the false representation is made by one who is no party to the agreement entered into on the faith of it, the contract cannot be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion so far as this may be possible" (*d*).

**Fraud by agent of one of the parties.**—Where one of the parties acts in the matter of the agreement through an agent, duly authorized in that behalf, and the agent induces the agreement by a fraud committed upon the other party, the agreement may be avoided against the principal, although he did not authorize the fraud and was not cognizant of it (*e*).

Where an agent employed to make a contract for his principal, without the authority or knowledge of his principal made an untrue statement which induced another contract, but did so without any fraudulent intention and believing the statement to be true, it was held that the contract was binding, and could not be avoided on the ground of fraud, although the principal was aware of the truth respecting the matter (*f*).

(*a*) *Brockwell's Case*, 4 Drew. 205; 26 L. J. C. 855; *Ayre's Case*, 25 Beav. 513; 27 L. J. C. 579; *Ex p. Frowd*, 30 L. J. C. 322.

(*b*) *Brockwell's Case*, 4 Drew. 205, 213; 26 L. J. C. 855, 860; *Nicol's Case*, 3 De G. & J. 387; 28 L. J. C. 257.

(*c*) *Ex p. Worth*, 4 Drew. 529; 28 L. J. C. 589; *Duranty's Case*, 26 Beav. 268; 28 L. J. C. 37.

(*d*) *Pulsford v. Richards*, 17 Beav. 87, 95; and see *Montefiori v. Montefiori*, 1 W. Bl. 363; *Neville v. Wilkinson*, 1 B. C. C. 543; *Scott v. Scott*, 1 Cox, 366; *Money v. Jorden*, 15 Beav. 372, 378.

(*e*) *Attwood v. Small*, 6 Cl. & F.

232, 448; *Wheelton v. Hardisty*, 8 E. & B. 232, 260; *Murray v. Mann*, 2 Ex. 538; *Brockwell's Case*, 4 Drew. 205, 212; 26 L. J. C. 855, 856. In a recent case the judges of the Court of Exchequer were equally divided upon the question whether the principal is liable to an action for the unauthorized fraud of his agent committed in the course of the transaction. *Udell v. Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337, where see all the authorities on this point cited.

(*f*) *Cornfoot v. Fowke*, 6 M. & W. 358, Lord Abinger. C. B. *dissentiente*; and see *Fuller v. Wilson*, 3 Q. B. 58, 68, 1009.

**Avoidance of contract induced by fraud.**—Where an agreement has been induced by the fraud of one of the parties upon the other, the party defrauded has the right of avoiding the agreement upon the discovery of the fraud; but, subject to the exercise of such right, the agreement is binding. So, a deed of which the execution has been induced by fraud is not therefore void; but the party defrauded may at his election treat it as void (*a*). In an action on a contract, in order to enable the defendant to assert an avoidance of the contract on the ground that it was induced by fraud, the defence of fraud must be specially pleaded (*b*).

If a party who has been induced to enter into an agreement by the fraud of the other party, after discovering the fraud, treats the agreement as binding, he loses his right of avoiding it. A person was induced to purchase shares in a company by misrepresentations of the seller, some of which he afterwards discovered to be fraudulent, but he continued to deal with the shares as his own; he was held to be precluded from avoiding the sale, and it was also held that the subsequent discovery of a new incident in the fraud served only to corroborate the original fraud, but did not revive the right of avoidance which he had waived (*c*). The plaintiff was induced to undertake certain work for the defendant at a certain price upon a fraudulent representation of the defendant as to the quantity of the work, and after discovering the fraud continued and completed the work: it was held that he could not avoid the contract and claim payment from the defendant according to the value of the work, but could only claim according to the terms of the contract (*d*).

So, where one party, after full knowledge of the misrepresentations alleged to have been made, gave notice to the other party that he insisted on the performance of the contract by a certain time, otherwise he should consider it at an end, and offered to perform his part of the contract, he was held in equity to have precluded himself from resisting specific performance on the ground of fraud (*e*); and where the plaintiffs sought to avoid an agreement for the lease of a mine on the ground of fraudulent misrepresentations of its value, having continued to work the mine after full knowledge of all the circumstances of the fraud, they were held not to be entitled to relief (*f*).

The agreement cannot be avoided upon the discovery of the fraud, if it has then been so far acted upon and performed, or if the circumstances have so far changed, that the parties can no longer be restored

(a) *Per Maule, J., Pilbrow v. Pilbrow's Atmospheric Ry. Co.*, 5 C. B. 440, 453.

(b) *Reg. Gen.* 8 T. T. 1853; and see *Robson v. Luscombe*, 2 D. & L. 859.

(c) *Campbell v. Fleming*, 1 A. & E.

40; and see *Ex p. Briggs*, L. Rep. 1 Eq. 483; 35 L. J. C. 320.

(d) *Sehway v. Fogg*, 5 M. & W. 83.

(e) *Macbryde v. Weekes*, 22 Beav. 533.

(f) *Vigers v. Pike*, 8 Cl. & F. 562.

to the original position in which they were at the time of the agreement being made, or if they are not so restored (*a*). Accordingly, in an action by a public company against a shareholder for calls, a plea, that the defendant was induced to become a shareholder by the fraud of the plaintiffs, was held bad, as admitting that the defendant was still a *de facto* shareholder; and it was said that to make the plea good, if it could be made good at all, it ought to have alleged that he had not taken any benefit as a shareholder, and that as soon as he discovered the fraud he disaffirmed the transfer to him, and gave up the shares, and ceased to be a shareholder (*b*). The plaintiff took shares in a mining company on the cost book principle, which he continued to hold and upon which he received the dividends; afterwards the company was registered as a joint stock company with limited liability and an order was made for winding up the latter company, and pending the proceedings the plaintiff discovered that he had been deceived into taking the shares by the fraudulent misrepresentation of the directors; it was held that he could not repudiate the shares and recover the original price paid for them on the ground of the fraud, because it was no longer possible for him to return the shares in their original state, or reinstate the parties in their original positions (*c*).

In the case of an agreement for a lease induced by a fraud upon the landlord, it was held that whilst the agreement was executory the landlord had a right on discovering the fraud to exercise his option to avoid the agreement, but that, after letting the tenant into possession and executing the lease, he could not avoid the agreement and turn the tenant out of possession (*d*). In an action upon the acceptance of a bill of exchange the defendant pleaded that the bill was accepted by him in payment of a ship sold to him by the plaintiff, and that he was induced to purchase the ship by false and fraudulent representations of the plaintiff respecting the state of the ship; the plea was held bad, because it appeared from it that the defendant still had the ship (*e*).

Although from the causes above mentioned it may be no longer open to the party defrauded, upon the discovery of the fraud, to avoid the agreement, he may have his remedy for the fraud by a special action upon the case to recover the amount of damages occasioned by it, treating the fraud as a substantive cause of action (*f*).

(*a*) *Deposit and General Life Ass. Co. v. Ayscough*, 6 E. & B. 761; 26 L. J. Q. B. 29; *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; and see *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783.

(*b*) *Deposit and General Life Ass. Co. v. Ayscough*, 6 E. & B. 761; 26 L. J. Q. B. 29.

(*c*) *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223.

(*d*) See per Blackburn, J., *R. v. Saddlers Co.*, 32 L. J. Q. B. 337, 343; *Feret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185; and see *Stewart v. Aston*, 8 Irish C. L. Rep. 35.

(*e*) *Sully v. Frean*, 10 Ex. 535.

(*f*) See *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223.

**Effect of avoidance of the contract upon the rights of the parties.**—The effect of the avoidance of an agreement on the ground of fraud is to place the parties in the same position as if it had never been made; and all rights which were transferred or created by the agreement are revested or discharged by the avoidance.

Thus, a person who has been induced to buy goods by the fraud of the seller may avoid the contract of sale and return the goods, and recover back the money paid for the price as money received by the seller for his use (*a*). So, a person who has been induced by fraud to sell goods may avoid the contract and recover back his goods from the buyer. A seller of goods under a contract induced by the fraud of the buyer was held entitled to disaffirm the contract and revest the property in himself and recover the goods, notwithstanding the buyer had become bankrupt and his assignees had taken possession of the goods; for the assignees took only the interest of the bankrupt, and they could not claim the goods as having been in the possession of the bankrupt with the consent of the true owner, because the contract only showed a consent to the bankrupt taking the possession as buyer (*b*).

If a person has been induced to enter into a contract by fraud under which he has delivered his goods or money, or rendered his services, and he disaffirms the contract, he cannot charge the other party with any other contract as arising out of the transaction, but is remitted to his remedies for the fraud and for the recovery of his property (*c*).

**Effect of avoidance of the contract upon the rights of third parties.**—The rights of third parties acquired through a contract induced by fraud, before avoidance of the contract, and without participation in or notice of the fraud, cannot be affected by a subsequent avoidance.

Thus, where a person has purchased goods from another by means of a fraudulent sale, and before avoidance of the contract resells them to a third party, who takes them without knowledge of the fraud, the latter acquires a good title to the goods, which cannot be defeated by the original seller subsequently disaffirming the contract (*d*).

In the judgment delivered in the case of *Kingsford v. Merry* (*e*), the effect of a fraudulent sale upon the property in the goods sold was explained as follows:—"It is quite clear that when a vendee obtains possession of a chattel with the intention, by the vendor, to transfer both the property and the possession, although the vendee has com-

(*a*) *Gompertz v. Denton*, 1 C. & M. 207.

(*b*) *Load v. Green*, 15 M. & W. 216.

(*c*) See the cases cited *ante*, 19.

(*d*) *White v. Garden*, 10 C. B. 919.

(*e*) 11 Ex. 577, 579; 25 L. J. Ex. 166, 168.

mitted a false and fraudulent misrepresentation in order to effect a contract or to obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred over the whole or part of the chattel to an innocent transferee, the title of such transferee is good against the vendor."

The judgment of the Court of Exchequer in that case was reversed on appeal, but without impugning the law as stated in the passage above quoted. The Court of Exchequer had decided the case upon the supposition that the goods had in fact been obtained from the original owner by a contract of sale induced by the fraud of the vendee, and that the fraudulent vendee had transferred the goods before disaffirmance of the contract to a third party who took them *bona fide* and without notice of the fraud, and that therefore the case came within the principle of law above laid down. The Court of Exchequer Chamber however decided, upon the facts, that there was not any contract of sale, but that the possession of the goods was obtained from the original owner by a mere fraud without any contract to support a transfer of property, and consequently there was no title in the fraudulent transferee which he could transfer to a third party (a).

The plaintiff, intending to sell goods to a certain firm, delivered them to a person who in order to obtain the goods had falsely represented himself to the plaintiff as a member of the firm and authorized to buy for them, and who after receiving the goods pledged them with the defendant; it was held that the plaintiff was entitled to recover the goods from the defendant, because, the contract having been professedly made with the firm, there was no contract conferring any property on the person to whom the goods were delivered and from whom the defendant claimed title (b).

Upon this principle, where a person has been induced to become a shareholder of a company through fraud of the company, he cannot, by avoiding his contract with the company and repudiating his shares, evade his liability to creditors of the company who dealt with the company whilst he remained a shareholder, and who were not parties to the fraud (c). So, where a negotiable instrument is obtained by fraud, the negotiation of the instrument gives a valid title to a transferee, who takes it without notice of the fraud (d).

(a) *Kingsford v. Merry*, 11 Ex. 577; 25 L. J. Ex. 166; 1 H. & N. 503; 26 L. J. Ex. 83; and see *Parker v. Patrick*, 5 T. R. 175; *Boyson v. Coles*, 6 M. & S. 14; *Higgon's v. Burton*, 26 L. J. Ex. 342.  
(b) *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105.

(c) *Henderson v. Royal British Bank*, 7 E. & B. 356; 26 L. J. Q. B. 112; *Powis v. Harding*, 1 C. B. N. S. 533; 26 L. J. C. P. 107; *In re Overend, Gurney & Co. (Peek's Case)*, Weekly Notes, 1867, p. 53; Notes of Cases, 1867, p. 61.  
(d) *Barber v. Richards*, 6 Ex. 63; *May v. Chapman*, 16 M. & W. 355.



**Contracts with warranty, and conditional upon the truth, of representations.**—A contract may in its terms expressly warrant the truth of representations by which it is induced; or it may be made conditional, as to its validity, upon the truth of such representations.

**Contract of sale with warranty.**—Contracts of sale are frequently made containing a warranty of the title of the seller, or of the quality of the article sold. In contracts of sale of specific chattels a warranty of the title of the seller, or of the quality of the article, or of any representations previously made respecting it, is not, as a general rule, implied in law; though such warranty may often be inferred as a fact from the nature or circumstances of the sale (*a*). The maxim *caveat emptor* applies; which means that if the purchaser is satisfied without requiring a warranty of such matters he takes the risk of them upon himself, and cannot recover upon a mere representation made by the seller which turns out to be false, unless he can show that the representation was not only false but also fraudulent (*b*).

Where there is a warranty contained in such contract, and the warranty is broken, the purchaser is not entitled to avoid the contract upon the mere breach of warranty; but if a representation is made fraudulently for the purpose of inducing a contract, the consequences of the fraud are not altered by the representation being warranted in the contract, and the party defrauded is entitled to avoid the contract on the ground of the fraud, notwithstanding the warranty of the same matter (*c*).

A contract of sale may, however, be made conditional, as to its validity, upon a warranty or representation respecting the goods; and then the breach of such warranty or representation avoids the contract independently of fraud (*d*). The contract may also expressly provide in its terms for a rescission of the contract, and the return of the goods and the price, upon a breach of the warranty (*e*).

Upon a sale of goods, which are not specifically ascertained, but are described by kind and quality, the seller becomes bound to deliver goods answering to the description in the contract, and, thus, such description is substantially warranted; but in such case, if the goods delivered do not answer the description contracted for, the buyer may return them or refuse to accept them, not by reason merely of a breach

(*a*) See *Morley v. Attenborough*, 3 Ex. 500; *Eichholz v. Bannister*, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

(*b*) *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 627; *Hopkins v. Tanqueray*, 15 C. B. 130; 23 L. J. C. P. 162; *Ormerod v. Huth*, 14 M. & W. 651.

(*c*) *Weston v. Downes*, Doug. 23;

*Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 207; *Murray v. Mann*, 2 Ex. 538.

(*d*) *Bannerman v. White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28; and see *Dawson v. Collis*, 10 C. B. 523.

(*e*) See *Adams v. Richards*, 2 H. Bl. 573.

of warranty, as such, but because the delivery of such goods is not a performance of the contract (*a*).

**Contracts of insurance.—Marine insurance.**—There are some important classes of contracts which are made on the basis of the representations of one of the parties, so that the validity of the contract is conditional upon the truth of those statements. In contracts of marine insurance the risk insured against, which forms the subject of the contract, is commonly described by the insured, and is accepted by the insurer entirely upon his description. The accuracy and completeness of the description of the risk intended to be insured thus becomes an essential condition of the contract. The insured is bound to disclose and truly represent all material facts within his knowledge touching the risk; and the concealment or misrepresentation of any such fact avoids the contract, although not accompanied with any fraudulent intention (*b*).

According to Lord Mansfield (*c*), "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement." And according to Parke, B. (*d*), "Policies of insurance are made upon an implied contract between the parties, that everything material, known to the assured, should be disclosed by them. That is the basis on which the contract proceeds; and it is material to see that it is not obtained by means of untrue representation or concealment in any respect."

**Insurance on life.**—In a recent case in the Exchequer Chamber it was held that in policies of insurance on life it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life proposed for insur-

(*a*) See *Street v. Blay*, 2 B. & Ad. 456, 463; per Lord Abinger, C.B., *Chanter v. Hopkins*, 4 M. & W. 399, 404; *Ollivant v. Bayley*, 5 Q. B. 288; *Lorymer v. Smith*, 1 B. & C. 1.

(*b*) See *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; 1 Smith's L. C. 5th ed. 472; per Bayley,

*J. Lindenau v. Desborough*, 8 B. & C. 586, 592; *Behn v. Burness*, 3 B. & S. 751, 753.

(*c*) *Carter v. Boehm*, 3 Burr. 1905, 1909; 1 Smith's L. C. 5th ed. 472.

(*d*) *Moens v. Heyworth*, 10 M. & W. 147, 154.

ance, but that such condition, if intended, must be made the matter for express stipulation. Consequently, an erroneous statement, not fraudulently made, and the truth of which had not been expressly stipulated for as a condition of the contract, was held not to avoid the policy (*a*). Before this decision the opinion seems to have prevailed that policies of insurance on life came under the same rule as policies of insurance on ships, namely, that they were made conditionally upon the truth and completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy (*b*). It is, however, an implied condition that the person whose life is insured is alive at the time of the making of the policy; and where a policy was made upon the life of a person who was then dead, though neither party to the policy was aware of his death, the policy was held void (*c*).

In effecting policies of insurance on life it is commonly required by the insurer that the insured shall sign a written declaration containing certain statements respecting the life insured, and it is expressly stipulated in the policy that such declaration is the basis of the contract; the effect of which is, that an untrue statement contained in the declaration, though it be not fraudulent, and even though it be not material in inducing the policy, avoids the contract (*d*). Such a declaration expressly defines and limits by agreement the rights of the insurers as to the communication and materiality of facts; consequently, reticence or mistake respecting any matter not specified in the declaration, in the absence of fraud, does not affect the policy (*e*).

It is sometimes expressly agreed between the insurer and the insured that the policy shall not be disputed on the ground of merely untrue statements not fraudulently made; and then any misrepresentation or concealment undesignedly made does not avoid the policy (*f*). In the case of *Wood v. Dwarries* (*g*) an insurance company published a prospectus, undertaking that their policies should be indisputable except in cases of fraud, and a policy was made upon the faith of the prospectus, but did not incorporate it; the company was held, upon equitable grounds, to be precluded from disputing the policy upon the ground merely of an untrue statement, though the policy was expressed in its terms to be made upon the condition of the truth of

(*a*) *Wheulton v. Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241.

(*b*) *Lindenau v. Desborough*, 8 B. & C. 586; and see *Jones v. Provincial Ins. Co.*, 3 C. B. N. S. 65, 86; 26 L. J. C. P. 272, 274.

(*c*) *Pritchard v. Merchants' Life Ins. Soc.*, 3 C. B. N. S. 622; 27 L. J. C. P. 169; *ante*, p. 589.

(*d*) *Anderson v. Fitzgerald*, 4 H. L. C. Vol. 1.—39

484; *Cazenove v. British Equitable Ass. Co.*, 6 C. B. N. S. 437; 28 L. J. C. P. 259.

(*e*) *Jones v. Provincial Ins. Co.*, 3 C. B. N. S. 65; 26 L. J. C. P. 272.

(*f*) *Fowkes v. Manchester and London Life Assur. Assoc.*, 3 B. & S. 917; 32 L. J. Q. B. 153.

(*g*) 11 Ex. 493; 25 L. J. Ex. 129.

such statement. But in the later case of *Wheelton v. Hardisty* (a) a difference of opinion seems to have been entertained amongst the judges as to the effect of such a prospectus upon a policy incorporating or referring to it.

Where a person proposes to insure the life of another, and for that purpose refers the insurer to the person whose life is to be insured, and to other named persons for the information respecting the life which may be required by the insurer, the persons thus referred to are not thereby constituted the agents of the insured in effecting the policy; and if their information is false and fraudulent, but not to the knowledge of the insured, the insurer is not entitled to avoid the policy on the ground that it was induced by the fraud of an agent of the insured; the insured is not affected by their statements unless it has been agreed that the policy shall be made upon the basis of those statements (b).

**Insurance against fire.**—Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy (c); and it seems that there is an implied condition that the property insured shall not be altered during the term insured so as to increase the risk (d). It has also been said that there is an implied condition that no material alteration shall be made in the premises during the term insured (e). But such conditions, if generally implied, are excluded by the insertion in the policy of express conditions respecting alterations in the premises insured (f). In effecting insurances on property against fire, it is the duty of the insured to communicate to the insurer all material facts within his knowledge touching the property (g).

**Contracts of guarantee.**—In contracts of guarantee and suretyship, as where a person stands surety to a creditor for the solvency of his debtor, or where the surety guarantees to an employer the honesty and good conduct of the person employed, the contract is in the nature of an insurance against risk; but the same rule does not prevail as in insurances on ships and other property. A person who takes a guarantee for the solvency or conduct of another is not bound to disclose all material facts and circumstances within his knowledge

(a) 8 E. & B. 232; 26 L. J. Q. B. 265; and see *Wood v. Dwaris* explained by Pollock, C. B., in *Reis v. Scottish Equitable Ass. Co.*, 2 H. & N. 19; 26 L. J. Ex. 279.

(b) *Huckman v. Fernie*, 3 M. & W. 505; *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J. Q. B. 265; explaining *Everett v. Desborough*, 5 Bing. 508.

(c) *Sillem v. Thornton*, 3 E. & B. 866; 23 L. J. Q. B. 362.

(d) See *ib.*

(e) *Stokes v. Cox*, 1 H. & N. 320, 533; 25 L. J. Ex. 291; 26 *ib.* 113.

(f) *Stokes v. Cox*, *supra*.

(g) *Bufe v. Turner*, 6 Taunt. 338; and see *Lindenau v. Desborough*, 8 B. & C. 586, 592; *Jones v. Provincial Ins. Co.*, 3 C. B. N. S. 65, 86.

respecting the transaction guaranteed; and the reticence or misstatement on his part respecting such facts and circumstances, in the absence of fraud, does not affect the validity of the guarantee (a). So, in contracts of indemnity, reticence or misstatement must be accompanied by fraud in order to vitiate the contract (b).

But where, upon a proposed contract of guarantee "the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does) that description amounts to a representation, or, at least, is evidence of a representation that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described; and if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, it is evidence of a fraudulent representation on his part (c)."

Where it had been agreed between the vendor and vendee of goods that the latter should pay at a rate above the market price, which extra sum was to be applied in liquidation of an old debt due to the vendor, and a guarantee was taken for the payment of the goods to be supplied, without communicating to the surety the bargain as to the price, it was held that there was a fraud on the surety which rendered the guarantee void (d). Where a guarantee was taken by a bank for the good behavior of an agent, it was held that the fact that the bank knew that the principal had misconducted himself in his office, which was not communicated to the sureties, was material as evidence of inaccurate representation that he was trustworthy, and ought to have been admitted to proof (e). The mere taking of a security for a banker's cash account, without communicating that the principal had already overdrawn his account, was held to be no evidence of a representation that he had not, as under such circumstances it might reasonably be supposed that he had (f).

The plaintiff, a coal-merchant, had employed an agent to sell coals

(a) *North British Ins. Co. v. Lloyd*, 10 Ex. 523; 24 L. J. Ex. 14; and see *Owen v. Homan*, 3 Mac. & G. 378; 20 L. J. C. 314; 4 H. L. C. 997; *Smith v. Bank of Scotland*, 1 Dow. 272; *Railton v. Mathews*, 10 Cl. & F. 934; *Hamilton v. Watson*, 12 ib. 109; *Lee v. Jones*, 17 C. B. N. S. 482; 34 L. J. C. P. 131.  
(b) *Way v. Hearn*, 13 C. B. N. S. 292; 32 L. J. C. P. 34.

(c) Per Blackburn, J., *Lee v. Jones*, 17 C. B. N. S. 482, 503; 34 L. J. C. P. 131, 138.  
(d) *Pidcock v. Bishop*, 3 B. & C. 605.  
(e) *Smith v. Bank of Scotland*, 1 Dow. 272.  
(f) *Hamilton v. Watson*, 12 Cl. & F. 109; see *North British Ins. Co. v. Lloyd*, 10 Ex. 523.

upon the terms that he was to be answerable for the price of the coals sold by him and to pay for them monthly, and also upon a guarantee for the due performance of his engagement to the amount of £300; afterwards the agent becoming indebted on the coal account above £1300, the plaintiff required further security, and an agreement was made for that purpose between plaintiff and the defendant, which recited the terms of the engagement of the agent and the former guarantee, and provided that the defendant should give a continuing guarantee to the plaintiff for three years to secure the amount of any balance that might at any time during the three years be due from the agent to the plaintiff; the plaintiff did not inform the defendant that any debt was then due from the agent; it was held by a majority of the Court of Exchequer Chamber that there was evidence to support a verdict that the agreement was obtained by fraud (a).

**Relief in Equity against fraud.**—The Courts of Equity exercise a jurisdiction to rescind contracts obtained by fraud or fraudulent concealment, such as would be sufficient to avoid the contract in a court of law; and the Court of Chancery will in some cases set aside an agreement as obtained under fraudulent circumstances, where the circumstances would not be sufficient to entitle the party in law to avoid the agreement on the ground of fraud. The Court of Chancery will in some cases refuse the remedy of specific performance of an agreement on account of the fraudulent or suspicious character of the transaction although it would not set aside the agreement (b).

**Pleading fraud at law upon equitable grounds.**—The fraud, upon which a court of equity would rescind the contract altogether, would, in general, be sufficient ground for avoiding the contract at law, and would be matter for a legal pleading. But there are cases where a court of equity would rescind a contract for a misrepresentation made without any fraudulent intention, in which the contract could not be avoided in law; and in such cases a plea on equitable grounds might be applicable. The fraud, which merely disentitles a party in equity to the remedy of specific performance, and is not sufficient ground for rescinding the contract, leaves the party his legal rights and remedies upon the contract, and is not matter for a pleading at law upon equitable grounds. Where the circumstances are such that a court of equity would rescind the contract for a misrepresentation, but upon terms of restitution, the equity, being conditional, is not a proper equitable ground for a pleading at law (c).

(a) *Lee v. Jones*, 17 C. B. N. S. 482; 34 L. J. C. P. 131; Bramwell, B., and Pollock, C.B., *dissentientibus*.

(b) See Story, Eq. Jur. §§ 184, 796; *Cox v. Middleton*, 2 Drew. 209.

(c) See *Gorsuch v. Cree*, 8 C. B. N. S. 574; 29 L. J. C. P. 308.

SECTION III.—DURESS.\*

Duress to the Person .....	613	Avoidance of Agreement in-	
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**Duress.**—An agreement apparently complete and sufficient to create a contract, may be vitiated by duress, as it is called in English law; that is, where one of the parties to the agreement was induced to consent by fear and intimidation, imposed by the violence or threats of the other party, he may avoid the agreement.

**Duress to the person.**—The duress recognized in law, as producing a sufficient degree of fear to vitiate an agreement induced by it, may consist in actual violence to the person, or in threats thereof (*a*). Duress by actual violence may consist in illegal imprisonment; but a legal imprisonment will not constitute duress. In commenting on duress by imprisonment Lord Coke lays down as follows:—"Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison."—"If a man be imprisoned by order of law, the plaintiff may take a feoffment of him or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment, for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in the prison or at large is tortious and unlawful, for *executio juris non habet injuriam*" (*b*).

**Duress by threats.**—Duress may also consist of threats of personal violence, which is called *duress per minas*. According to Lord Coke, in order to entitle a person to avoid his own act as induced by fear imposed by threats, "The fear must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses or the taking of or spoiling of his goods, this is not sufficient, because he may recover the same, or damages to the value, without any corporal hurt. Again, if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man.—*Talis enim debet esse metus qui cadere potest in virum constantem, et qui in se continet mortis periculum et corporis cruciatum.*—Fear of imprisonment is sufficient, for the law hath a special regard to the safety and liberty of a man" (*c*).

**Duress of goods.**—In the case of *Skeate v. Beale* (*d*) the distinction

(*a*) 1 Blackst. Com. 131.  
 (*b*) 2 Inst. 482; and see *Smith v. Monteith*, 13 M. & W. 427, 442.  
 (*c*) Co. Lit. 253 b; 2 Inst. 483; Bracton, l. 2, fo. 16 b; per Lord Ellenborough, C. J., *R. v. Southerton*, 6 East, 126, 140.  
 (*d*) 11 A. & E. 983, 990.

\* Ch. I, Sect. VI, § 3, Leake.

between duress of the person and duress of goods, as affecting agreements, was explained in the judgment of the Court as follows:—"We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and, with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert." Accordingly, where the plaintiff had seized the defendant's goods as a distress for rent, claiming more than was due, and the defendant, in consideration of plaintiff withdrawing the distress, promised to pay the arrears claimed, the agreement was held not to be voidable on the ground of the duress of the defendant's goods (a).

**Money obtained by duress of the goods.**—But where money is paid to release goods or property from duress and upon no other consideration, it is considered as an involuntary payment, and may be recovered. The distinction between the cases of money obtained by duress of goods and an agreement obtained by the same means is pointed out by Parke, B., in his judgment in the case of *Atlee v. Backhouse* (b). "There is no doubt that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, although there is some case in Viner's Abridgment to the contrary (c), that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone (d): but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground

(a) *Skeate v. Beale*, *supra*.

(c) Vin. Abr. Duress, (B), 3; 1 Roll. Abr. 687.

(b) 3 M. & W. 633, 650

(d) P. 61.



of duress" (a). In the above case (b), the Commissioners of Excise had seized goods of the plaintiff for the purpose of condemnation, and the plaintiff, in consideration of a return of the goods and the relinquishment of the proceedings for condemnation, paid the appraised value of the goods; it was held that the money was paid under a valid agreement made upon good consideration, and the duress of the goods formed no ground for avoiding the agreement.

**By and on whom the duress must be imposed.**—The duress must be the act of the party obtaining the contract, or done with his knowledge, and taken advantage of by him, for the purpose of obtaining the agreement (c).

**Duress on third party.**—A contract cannot be avoided on the ground that it was obtained by duress imposed on a third party. An action was brought on a bond conditioned that a third party should pay a sum of money, to which the defendant pleaded that the latter was illegally imprisoned at the instance of the plaintiff, and the defendant entered into the bond as his surety for the debt in order to release him from imprisonment; it was held that the plea was not any plea for the surety, although it had been a good plea for the principal, "for none shall avoid his own bond for the imprisonment or danger of any other than of himself only" (d). It is laid down in an old case that a person may avoid his deed if obtained by duress imposed on his father, or his wife, but not if obtained by duress imposed on his master or a stranger (e).

**Contract by agent induced by duress on his principal.**—A contract may be avoided on the ground of duress, where the contract is made by an agent of the party suffering the duress in order to remove the duress from his principal. The plaintiff had been confined in a private lunatic asylum, and an inquisition of lunacy had been instituted against her by the defendants, at which an arrangement was entered into and signed by the plaintiff's counsel, that the defendants should withdraw from the inquisition, and that the plaintiff should be released from restraint upon giving up certain deeds to the defendants; the plaintiff afterwards repudiated the arrangement as having been induced by duress, and brought the action for the recovery of the deeds; the Court decided for the plaintiff, saying:—"If her counsel acted for her, believing her of sound mind, from the same fear of inconvenience and disease as likely to arise from confinement

(a) And see per Coleridge, J., *Ashmore v. Wainwright*, 2 Q. B. 837, 846.

(b) *Atlee v. Backhouse*, *supra*.

(c) 1 Rolle, Abr. 688.

(d) *Huscombe v. Standing*, Cro. Jac.

187; and see *Pole v. Harrobin*, 9 East, 416 (a); *Smith v. Monteith*, 13 M. & W. 427.

(e) 1 Rolle, Abr. 687; and see Code Civil, § 1113.

which affected the mind of their principal, their proceeding ought to be considered as enforced by the same duress" (a).

**Avoidance of agreement induced by duress.**—An agreement induced by duress, like an agreement induced by fraud, is not absolutely void, but voidable only at the election of the party intimidated (b).—If a person having been constrained by duress to make a contract afterwards voluntarily acts upon it, he thereby affirms its validity and precludes himself from afterwards avoiding it (c). In an action upon a contract, the defense that it was procured by duress must be specially pleaded. (d).

**Relief in equity against duress.**—Courts of Equity exercise a jurisdiction to set aside contracts on the ground of duress. They will also set aside contracts in some cases on the ground that they were obtained by threats, or undue influence, or oppression, though not amounting to legal duress; and in some cases they will refuse to enforce such contracts by specific performance, though they will not set them aside, and will leave the parties to their legal remedies (e).

(a) *Cumming v. Ince*, 11 Q. B. 112.

(b) 2 Inst. 482.

(c) *Ormes v. Beadel*, 2 De G. F. & J.

333; 30 L. J. C. 1.

(d) *Whelpdale's Case*, 5 Co. Rep. 119

a; Reg. Gen. 8, T. T. 1853.

(e) Story, Eq. Jur. § 239.











